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No. _____

In The

Supreme Court of the United States

October Term, 1994

PEOPLE OF THE STATE OF MICHIGAN,

Petitioners,

v.

TIMOTHY LEE HENSICK,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals For The State Of Michigan

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE GRANT OF A RESPONDENT'S MOTION FOR NEW TRIAL BY A TRIAL JUDGE WHO HAS DEMONSTRATED HIS BIAS IN FAVOR OF THE RESPONDENT, AND AGAINST THE VICTIM, DEPRIVES THE VICTIM OF HER RIGHT TO DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS AS GUARANTEED BY THE UNITED STATES CONSTITUTION?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

CITATION TO OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT:

I. THE GRANT OF A RESPONDENT'S MOTION FOR NEW TRIAL BY A TRIAL JUDGE WHO HAS DEMONSTRATED HIS BIAS FOR THE RESPONDENT AND AGAINST THE VICTIM DEPRIVES THE VICTIM OF HER RIGHT TO DUE PROCESS OF LAW AND THE EQUAL PROTECTION OF THE LAWS AS GUARANTEED BY THE UNITED STATES CONSTITUTION 13

CONCLUSION 22

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES:

Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) 19

Georgia v. McCollum, 505 U.S. ___, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992) 16, 18

Haupt v. Dillard, 17 F.3d 285 (CA 9, 1994) 16

In re Murchison, 349 U.S. 133, 75 S.Ct. 623, 99 L. Ed. 942 (1955) 15, 16, 21

J.E.B. v. Alabama ex rel. T.B., 511 U.S. ___, 114 S. Ct. 1419, 128 L. Ed. 2d (1994) 19, 20

Morris v. Slappy, 461 U.S. 1, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983) 14

Payne v. Tennessee, 501 U.S. 808, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991) 13

People v. Milbourn, 435 Mich. 630; 461 NW2d 1 (1990) 10

Powers v. Ohio, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991) 18, 19

Scruggs v. Williams, 903 F.2d 1430 (CA 11, 1990) 15

Snyder v. Massachusetts, 291 U.S. 97, 54 S. Ct. 330, 78 L. Ed. 674 (1934) 13

South Carolina v. Katzenbach, 383 U.S. 301, 86 S. Ct. 803, 15 L. Ed. 2d 769 (1966) 16

United States v. Classic, 313 U.S. 299, 61 S. Ct. 1031, 85 L. Ed. 1368 (1941) 17

United States v. Hasting, 461 U.S. 499, 103 S. Ct. 1974, 76 L. Ed. 2d 96 (1983) 14

United States v. Mechanik, 475 U.S. 66, 106 S. Ct. 938, 89 L. Ed. 2d 50 (1986) 13

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL AUTHORITY:

Michigan Const 1963, art 1, § 24 19

U.S. CONST. amend. VI 16

U.S. CONST. amend. XIV, § 1 ..... 2, 15, 17, 21

STATUTORY AUTHORITY:

MCL 750.520b; MSA 28.788(2) 3

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TIMOTHY LEE HENSICK,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals For The State Of Michigan

BRIEF OF PETITIONER PROSECUTING ATTORNEY RICHARD THOMPSON

Petitioner Richard Thompson, Prosecuting Attorney in and for the County of Oakland, State of Michigan, by Richard H. Browne, Assistant Prosecuting Attorney, on behalf of the People of the State of Michigan, respectfully prays that a writ of certiorari issue to review the opinion of the Michigan Court of Appeals entered in this proceeding on June 9, 1994.

CITATIONS TO OPINIONS BELOW

The decision of the Michigan Supreme Court is in the form of an order denying leave to appeal filed January 25,

1995, and reported at 448 Mich 854 (1995). The decision of the Michigan Court of Appeals is dated June 9, 1994, and is unpublished. Copies of the order of the Michigan Supreme Court and the decision of the Michigan Court of Appeals are included in the Appendix to this Petition.

JURISDICTION

The order of the Michigan Supreme Court was filed on January 25, 1995. The jurisdiction of this Court is invoked under 28 USC 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions which this petition involves are:

> Constitution of the United States, Amendment XIV, § 1:
>
> > All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondent Timothy Hensick was charged with three counts of first-degree criminal sexual conduct [CSC]. MCL 750.520b; MSA 28.788(2). Respondent is a lawyer who is the son of a former Livingston County (Michigan) Circuit Judge. He had run for prosecutor against the current Livingston County Prosecutor. Therefore both the Livingston County Circuit Court bench and the Livingston County Prosecutor disqualified themselves from the case. The Oakland County (Michigan) Prosecutor's Office was brought in to conduct the prosecution and Judge G. Michael Hocking of Eaton County was assigned to sit as a visiting judge in Livingston County, Michigan.

Following a jury trial in Livingston County, Respondent was convicted by a jury as charged on all three counts. On November 25, 1991, Judge Hocking sentenced Respondent to three concurrent terms of 18 months to 10 years in prison. Respondent filed a claim of appeal and subsequently filed a motion for new trial in the trial court.

The Michigan Court of Appeals granted a motion to remand on April 14, 1992, to allow Respondent to pursue his motion for new trial. On November 13, 1992, Judge Hocking signed a written opinion which granted Respondent's motion for new trial. A written order granting the new trial was entered November 24, 1992. The Petitioner appealed from that order. The following summary of the testimony from the trial indicates the nature of the case and the parties' respective positions.

Respondent was the victim's lawyer; he represented her in a divorce action. At around 2:00 a.m. on a Sunday

morning, Respondent called the victim and told her he needed to talk to her. The victim agreed he could come over to her apartment. Once there, Respondent began kissing the victim and then sexually assaulted her. The victim herein clearly and specifically testified that she did not consent to the three sexual penetrations committed upon her by Respondent. The victim was 5'2" tall and weighed around 110 pounds. Respondent was taller and bigger than her. (R, 8-20-91, 100) The victim testified that Respondent forced himself upon her. He put his arms on her and "walked" her back up against a wall. (R, 8-20-91, 98-100) She tried to push him away. (R, 8-20-91, 98-99; 101-103) She asked him what he was doing and protested that she thought he must be crazy. (R, 8-20-91, 101) She told him she didn't want him to do this, but he did not stop. (R, 8-20-91, 103-104)

Respondent placed his mouth on her breast and she froze. She was scared and just couldn't say anything; she couldn't get anything out because of her fright. (R, 8-20-91, 105-106) Respondent then stuck his hand in her pants and placed his finger in her vagina. She tried at least twice to pull his hand out by grabbing his wrist, but he did not stop. (R, 8-20-91, 106-107)

Respondent took his penis out, grabbed the victim's hand, and forced her to touch his penis. She pulled her hand away, so he grabbed it and put it back on his penis. She felt numb; she just couldn't talk. (R, 8-20-91, 108) She didn't try to hit or hurt him because she was afraid of him; she didn't want to get hurt. She was afraid he would beat her up. (R, 8-20-91, 108-109)

Respondent then grabbed her hand and pulled her to the middle of the room. She didn't want to go with him, but she didn't feel she could stop him. (R, 8-20-91, 111) He told her to lay on the floor. She presumed he intended to have sexual intercourse with her, so she told him "No" – that she didn't want to get pregnant. (R, 8-20-91, 111-112)

Respondent went over and turned off the light. He then grabbed her hand again and pulled her to a chair. He pulled her to her knees and pulled off her shirt. When she tried to say she didn't want this, he told her: "Just relax. It'll be okay. Just relax." (R, 8-20-91, 112-113) He then pulled her head down onto his penis. She demonstrated that he had put both of his hands at the back of her head. She did not want this to happen. (R, 8-20-91, 113) She was worried Respondent was going to hurt her. When she tried to pull away by leaning back, Respondent pulled her mouth back down on his penis by putting his hands behind her head. He used his hands to make her head go up and down on his penis. (R, 8-20-91, 114-115) He kept telling her to, "Just relax."

He pushed her away from the chair, laid himself down on the floor, put a pillow behind his head, and then leaned up and grabbed the victim by her arm and pulled her over. (R, 8-20-91, 115-116) He grabbed her head again and pulled her mouth back down onto his penis. He forced her head up and down again. She tried to keep her head from moving, so he grabbed his penis with one of his hands and began masturbating into her mouth. He asked her if she'd ever done this to her husband. Since his penis was in her mouth, she couldn't respond. (R, 8-20-91, 117) It made her feel sick. She wanted to throw

up. (R, 8-20-91, 117-118) She was not able to make him stop doing this. Respondent ejaculated into her mouth. The victim grabbed her hair and spit the semen into the side of her hair. (R, 8-20-91, 118)

Respondent grabbed her by her arms and pulled her on top of him. She was crying. Respondent rolled her over onto the floor by putting his hands on her arm and pushing her over. He then started roughly grabbing and squeezing her breast. (R, 8-20-91, 119) The victim couldn't get away at this point because her back went out. Respondent was saying something, but she couldn't recall what it was. She just wanted him to get away from her. (R, 8-20-91, 120)

Respondent told the victim that he was going through a divorce, he'd had too much to drink, and he had stopped by his office to get her number. He asked her if she realized what had happened. She told him she was in shock. He then said to her: "You must have known how I felt about you when you first came into my office." (R, 8-20-91, 123)

Respondent left. The victim felt dirty. She took a shower, brushed her teeth, and rinsed her mouth out with mouthwash. (R, 8-20-91, 124-125) She then sat on her couch crying. She felt hurt and sad. Her breast hurt and her vagina hurt where Respondent had inserted his finger. Her back hurt also. These body parts had not hurt prior to Respondent's sexual assault. (R, 8-20-91, 125-126)

The victim called a sexual assault hot-line number. (R, 8-20-91, 126-167; R, 8-21-91, 3) She acknowledged that she had not used the word "force" to describe Respondent's actions. She explained that she felt "force" meant

being physically beat up, hit, or slapped. She described his actions as "persistent." (R, 8-21-91, 4) Respondent just wouldn't leave her alone – he kept coming after her when she tried to push him away. Respondent never asked the victim if she wanted sexual relations and she never gave him permission. (R, 8-21-91, 5) This victim became suicidal and had to be admitted to the Psychiatric Emergency Room at University of Michigan Hospital after she testified in open court at the preliminary examination about this rape.

Respondent admitted Ms. Ringe's allegations in all particulars except for alleging that he did not expose his penis, claiming that only one act of oral sex occurred, and claiming that the victim consented. (R, 8-29-91, 70-77) Respondent testified he went out to a basketball game with friends. Over about a five-hour period he allegedly consumed about four to five beers. (R, 8-29-91, 59-60) On his way home, at about 2:00 in the morning, he stopped at his office to call Tina Ringe and check his phone messages. (R, 8-29-91, 61) He claimed that he called Ringe and told her he "wondered if she wanted to talk." (R, 8-29-91, 62) He claimed that she answered affirmatively and told him her apartment number. (R, 8-29-91, 62) He claimed that when he arrived at her apartment they had a conversation in which he explained it was his "impression" that they had more than a business relationship. Her response to this was supposedly to smile and say, "Well." (R, 8-30-91, 69-70) After their "conversation" ended, he allegedly kissed her. (R, 8-30-91, 70) He claimed that he proceeded to have consensual sex with Tina Ringe initiating the oral sex, while he, ever the gentleman, tried to avoid ejaculating in her mouth. (R,

8-30-91, 75-76) He didn't try to have sexual intercourse with her (after all, this was only their first intimate encounter). After the sex was finished, he told her he'd call her the following day to make plans for dinner the following Friday and she allegedly told him, "Fine." He claimed that they parted amicably with her kissing him goodbye at the door. (R, 8-30-91, 78)

Respondent also presented witness Mark Lyon who testified that he'd questioned Tina Ringe about the alleged assault. He asked her if Respondent had used force and she said, "No." He asked if Respondent threatened her and she said, "No." He finally commented that it sounded like she was "a willing participant in this thing." Tina Ringe hesitated and then said, "Well, I guess I was." (R, 8-28-91, 158)

At the sentencing, the trial judge sentenced Respondent to three concurrent terms of 18 months to 10 years imprisonment. This was $6^1/_2$ years below the minimum sentence range recommended by the Michigan Sentencing Guidelines. The trial judge twice stated unequivocally that if he'd tried the case he would have acquitted the Respondent. (R, 11-25-91, 20; 56) He then made it abundantly clear that his belief in Respondent's innocence was going to control how he scored the sentencing guidelines and what sentence he would impose. He went out of his way to tell the Respondent what issues he believed should be raised in a motion for new trial or on appeal. (R, 11-25-92, 55-57) But the most telling indications of where the trial court's thinking was coming from were offered by the judge when he listed his reasons for departing below the sentencing guidelines. The trial judge stated:

Number four – the fact that the victim agreed to the Defendant's 2:00 a.m., Sunday morning visit is a mitigating circumstance, again with regard to the presence of an evil state of mind on behalf of the Defendant. This is not a perfect world, but as *common sense tells me that when a man calls a woman at 2:00 a.m. and says that he wants to come over and talk and he's – that's accepted*, a reasonable person, whether you want to shake your head or not, Ms. Maas, I haven't been living in a shell. *A reasonable person understands that that means certain things.* They may be wrong.

The next factor I've considered: The victim and the Defendant, in this case, were very familiar with each other, as opposed to an attack by a total stranger. The Guidelines don't give any consideration for that distinction. This is a mitigating factor, and the Milbourn court says it is. This is a mitigating factor as the Guidelines give it no consideration at all. And that's also a reason to go outside of the Guidelines.

Number six reason in determining the proportionate sentence, as well as going outside the Guidelines, as all previous five are, here for both purposes: One factor I have to consider is that *this was the weakest criminal case that resulted in a conviction that I've ever seen*, and I've been an attorney for 15 years, 14 of which I was a Prosecuting Attorney. The Guidelines don't consider that. (R, 11, 25-91, 44-45; emphasis supplied)

After relating the mitigating factors presented by Respondent's profession and past life, the trial judge further commented:

> In this regard, *I do not find any credible evidence that the victim consented to the Defendant's visit for professional reasons. The jury could believe whatever they want.* That was not based on an essential element of this offense. To me it defies reason and logic. And I'm the one that has to consider the Guidelines, not the jury. There [sic -that?] was not a fact found by the jury. I am finding it for the purposes of this sentence.
>
> (R, 11-25-91, 45-46; emphasis supplied)

The trial judge then listed the four main sentencing factors and stated that he had considered all of them and recognized that the decision of *People v. Milbourn*, 435 Mich 630; 461 NW2d 1 (1990) allowed departures from the Michigan Sentencing Guidelines where the sentencing guidelines hadn't sufficiently accounted for one or more of the factors. The trial judge them continued:

> Item nine – and I've considered this: The element of personal injury, as resulting from this occurrence, is tenuous, less clear cut and intertwined with preoffense-date trauma for which this Defendant was not a cause.
>
> Item ten: There is no evidence that the force used was anything other than the absolute minimum required to cross the threshold of force, which turned this into a crime, if you believe the findings of the jury. *And I'm forced to do that for this proceeding.*
>
> Number 11: A mitigating factor, although minor, is evidence that *the defendant helped the victim up off the floor after the occurrence.* Another mitigating factor – that the victim told a spouse-abuse agency the sex was not forced but resistance – her resistance was worn down by the

> Defendant's persistent request. I heard that sworn testimony, and I've considered it at sentencing. (R, 11-25-91, 46-47; emphasis supplied)

By order dated January 22, 1993, the Michigan Court of Appeals granted the Petitioner's application for leave to appeal from the grant of a new trial and consolidated it with pre-existing appeals 147862 and 146734 (an appeal by the Petitioner from the sentence imposed and an appeal by the Respondent from his conviction). In the appeal, Petitioner argued that the trial judge had been biased against the female victim (and also against the female assistant prosecutor who tried the case) because of their gender, and that this gender bias had been the underlying factor in the trial court's decision to order a new trial. In the sentencing appeal, Petitioner argued that the trial court's gender bias, as revealed by his comments at the sentencing, had been responsible for his decision to drastically depart from the minimum sentence range recommended by the Michigan Sentencing Guidelines.

On June 9, 1994, the Michigan Court of Appeals issued a 2-1 per curiam decision which affirmed the trial court's grant of a new trial. The Court found no merit to two of the four issues used by the trial court to justify its grant of a new trial. The Court also noted that the trial court's assessment of the prosecution's harmless error argument was erroneous because "Unfortunately, the trial court's personal view of this case clouded its vision as to the relative strengths of the parties' cases." (Opinion of the Michigan Court of Appeals, App. 8) The Court of Appeals also decided that "the trial judge on remand would have substantial difficulty putting out of his mind

his previously expressed views and findings, and to preserve the appearance of justice, retrial should be had before a different judge." (Opinion of the Michigan Court of Appeals, App. 8) The other two appeals were mooted by this decision. Judge Richard Griffin filed a dissenting opinion which found no merit in any of the reasons advanced for granting a new trial and went on to declare that the sentence imposed by the trial judge on Respondent was a "dramatic downward departure from the minimum sentences recommended by the sentencing guidelines" for reasons that "were blatantly inappropriate and unwarranted." (See Opinion of Court of Appeals, App. 12)

Petitioner sought leave to appeal or alternative summary relief in the Michigan Supreme Court, again arguing that the trial court's decision had been motivated by his gender bias against the female victim and the female assistant prosecutor. By order dated January 25, 1995, the Michigan Supreme Court denied the application for leave to appeal. Justices Boyle, Weaver, and Mallet would have granted the application. (App. 13-14)

Subsequent to the order of the Michigan Supreme Court, the Michigan Judicial Tenure Commission has issued a report dated April 10, 1995, finding that the trial judge's comments at the sentencing in this case "strongly suggest impermissible gender bias by implying the victim was somehow responsible for or invited the assault." *In the Matter of Hon. G. Michael Hocking*, Formal Complaint no. 48; Decision and Recommendation For Order of Discipline, Michigan Judicial Tenure Commission, p 5.

REASONS FOR GRANTING THE WRIT

I. THE GRANT OF A RESPONDENT'S MOTION FOR NEW TRIAL BY A TRIAL JUDGE WHO HAS DEMONSTRATED HIS BIAS FOR THE RESPONDENT AND AGAINST THE VICTIM DEPRIVES THE VICTIM OF HER RIGHT TO DUE PROCESS OF LAW AND THE EQUAL PROTECTION OF THE LAWS AS GUARANTEED BY THE UNITED STATES CONSTITUTION

> " * * * [J]ustice, though due the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."
>
> *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991), quoting Justice Cardozo in *Snyder v. Massachusetts*, 291 U.S. 97, 122, 54 S. Ct. 330, 78 L. Ed. 674 (1934).

The trial court in this case, and the appellate courts of the State of Michigan, have forgotten this wise admonition from Justice Cardozo. They have forgotten that, as Chief Justice Rehnquist observed in *United States v. Mechanik*, 475 U.S. 66, 72, 106 S. Ct. 938, 89 L. Ed. 2d 50 (1986):

> The reversal of a conviction entails substantial social costs: it forces jurors, witnesses, courts, the prosecution, and the defendants to expend further time, energy, and other resources to repeat a trial that has already once taken place; ***victims may be asked to relive their disturbing experiences.*** * * * . (Emphasis supplied).

At a time when the Victim's Rights movement continues to gain recognition and support, this Court has already noted that such concerns have a proper place in

the mix of considerations which must be taken into account by a court deciding whether a new trial is merited. As this Court stated in *Morris v. Slappy*, 461 U.S. 1, 14-15, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983), courts should not forget:

> * * * to take into account the interest of the victim of these crimes in not undergoing the ordeal of yet a third trial in this case. * * * in the administration of criminal justice, courts may not ignore the concerns of victims. * * * The spectacle of repeated trials to establish the truth about a single criminal episode inevitably places burdens on the system in terms of witnesses, records, and fading memories, to say nothing of misusing judicial resources.

Similarly, in *United States v. Hasting*, 461 U.S. 499, 507, 103 S. Ct. 1974, 76 L. Ed. 2d 96 (1983), the United States Supreme Court again admonished the lower court for failing to give any weight to "these relevant interests":

> * * * It did not consider the trauma the victims of these particularly heinous crimes would experience in a new trial, forcing them to relive harrowing experiences now long past, or the practical problems of retrying these sensitive issues more than four years after the events.

The trial court in this case did not consider the effect on the victim of a decision to require retrial of the case. In fact, the comments of the trial judge set forth above clearly demonstrate that the trial judge was biased against the victim, at least in part because of her gender. A decision granting a motion for new trial which is based on the trial judge's bias for or against one of the parties violates the right of the party to a fundamentally fair

trial; such a decision by a biased decision-maker thus violates the party's right to due process. Where the decision is based upon gender discrimination, it also violates the party's right to equal protection of the laws.

Due process of law and equal protection are rights possessed by all citizens. U.S. CONST. amend. XIV, § 1. That includes citizens who are victims of crimes. When a victim is subjected to the indignity occasioned by a second trial and forced to "relieve harrowing experiences now long past" because of the decision of a biased state trial judge, then the victim is deprived of the fairness that is the essence of due process of law and equal protection. "Due process requires that state criminal prosecutions be fundamentally fair." *Scruggs v. Williams*, 903 F.2d 1430, 1434 (CA 11, 1990). Due process requires that the proceedings, in this case a jury trial presided over by a judge, take place in an atmosphere free from bias and that determinations affecting the rights of the parties are made by an impartial judge - one who favors neither side.

Procedural rules exist to help insure that the proceedings will be conducted in a fair and impartial manner. The procedures used must "hold the balance nice, clear, and true between the State and the accused". *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955). Nevertheless, experience teaches that impartiality sometimes is absent from a particular trial. To satisfy the stringent requirements of due process, our system strives "to prevent even the probability of unfairness." *In re Murchison, supra*, at 136. Accordingly, "to perform its high

function in the best way 'justice must satisfy the appearance of justice.' " *Id.* When that does not occur, the right to due process enjoyed by all citizens is violated.

The Constitution and the laws of this Country are structured so as to ensure that criminal defendants are convicted only after having received due process. They are to receive notice of the charges, the right to counsel, the right to confront and cross-examine their accusers, the right to compel the attendance of witnesses, the right to a speedy and public trial, and the right to an impartial jury which represents a cross-section of the community. U.S. CONST. amend. VI. They are also guaranteed the right to have the trial presided over by a neutral and objective magistrate who will rule on the questions of law that arise without bias and who will treat both sides equally and impartially. "The right to a fair trial is a 'basic requirement of due process' and includes the right to an unbiased judge." *Haupt v. Dillard*, 17 F.3d 285, 287 (CA 9, 1994), citing *In re Murchison, supra.*

Although a State is not a "person" and thus does not have a right to due process, *South Carolina v. Katzenbach*, 383 U.S. 301, 323-324, 86 S. Ct. 803, 15 L. Ed. 2d 769 (1966), a victim who is a citizen of the United States is clearly a "person" within the meaning of the Fourteenth Amendment and is thus entitled to due process and equal protection under that provision. The victim can only assert her right to due process and equal protection through the prosecutor who stands as her legal representative at the trial and on appeal. *Cf. Georgia v. McCollum*, 505 U.S. ___, 112 S. Ct. 2348, 2357, 120 L. Ed. 33, 49 (1992) ("As the representative of all its citizens, the State is the logical and proper party to assert the invasion of the

constitutional rights of the excluded jurors in a criminal trial. Indeed, the Fourteenth Amendment forbids the State from denying persons within its jurisdiction the equal protection of the laws.")

Moreover, there can be no question that the biased decisions of a state trial judge, acting in his judicial capacity by granting a new trial, constitute "state action." The trial judge is an elected official of the State of Michigan charged with presiding over the trial of legal disputes which arise under the laws of the State. His official decisions, whether they impact upon criminal defendants *or* their victims, clearly constitute "state action" within the Fourteenth Amendment. As this Court stated in *United States v. Classic*, 313 U.S. 299, 326, 61 S. Ct. 1031, 85 L. Ed. 1368 (1941): "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." The Michigan Judicial Tenure Commission has determined that the trial judge who ordered the new trial in this case exhibited bias or the appearance of bias against the female victim and against the female prosecutor who tried this case.[1] This bias inevitably colored the trial judge's decision to grant a new trial in this case to the detriment of the female victim

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[1] As noted in the Statement of the Case, the Michigan Judicial Tenure Commission has issued a report finding that the trial judge's comments at sentencing "strongly suggest impermissible gender bias". The Michigan Court of Appeals, in the course of rejecting the trial court's application of the harmless error test to a claim of prosecutorial misconduct, also found evidence of bias by the trial court. (See Statement of the Case, pp 11-12; App. 8)

and the prosecution. "Surely, a State suffers a similar injury when the fairness and integrity of its own judicial process is undermined." *Georgia v. McCollum, supra,* 112 S. Ct. at 2357, 120 L. Ed. 2d at 49. Just as surely, the right of both sides to the impartial judge guaranteed under due process is violated where the official decisions of a trial judge result from the bias of that judge for or against a party.

In arriving at its decision in this case, the Michigan Court of Appeals did not consider the trial judge's improper bias or the victim's and the prosecution's right to a decision on the motion for new trial rendered by an unbiased judge. There can be no dispute that if a trial judge was shown to be biased against a defendant, any appellate court would immediately reverse an outcome-determinative ruling by the judge against a criminal defendant.

The public's confidence in the criminal justice system is undermined when a judge is allowed to set aside the verdict of a jury for reasons that reflect actual gender bias (or even the appearance of gender bias) against the victim and the prosecutor. As this Court stated in a similar context in *Georgia v. McCollum, supra,* 112 S. Ct. at 2353:

> * * * One of the goals of our jury system is "to impress upon the criminal defendant and the community as a whole that the verdict of conviction or acquittal is given in accordance with the law by persons who are fair." [citing *Powers v. Ohio,* 499 U.S. 400, 413, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991).]

When the male jurist who presides over the trial of a politically-connected male lawyer for sexual assaults

committed on a female client makes statements expressing his preconception of the male defendant's innocence, makes blatantly sexist remarks in justifying a departure below the sentencing guidelines, and then subsequently grants a new trial on legal grounds that are meritless, the public cannot help but conclude that the "old boy's network" is functioning with the sanction of the judicial system. Paraphrasing this Court's observation in *Powers, supra,* 499 U.S. at 412: "this process condones violations of the United States Constitution within the very institution entrusted with its enforcement, and so invites cynicism respecting the [judge's] neutrality and [his] obligation to adhere to the law."

Society has demonstrated its concern over fair treatment for the victims of crime by supporting constitutional amendments and legislation dealing with establishing specifically enumerated rights for victims. Michigan Const 1963, art 1, § 24 specifically guarantees the victim "the right to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process."

This Court has demonstrated its concern that its processes and procedures should be free from unconstitutional bias such as gender bias or racial bias. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. ___, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994); *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). The effect of the trial court's bias in granting a new trial to the Respondent is analogous to the unconstitutional gender bias which this Court has not hesitated to condemn.

A decision by a state official that results from gender bias violates the right to equal protection of the person who is detrimentally affected by the biased decision. This Court has recently found an equal protection violation where peremptory challenges are utilized on the basis of a bias against women. In *J.E.B. v. Alabama ex rel. T.B., supra,* this Court stated:

> * * * Since *Reed v. Reed,* 404 U.S. 71, 92 S. Ct. 251, 30 L. Ed. 2d 225 (1971), this Court consistently has subjected gender-based classifications to heightened scrutiny in recognition of the real danger that government policies that professedly are based on reasonable considerations in fact may be reflective of "archaic and overbroad" generalizations about gender, * * * , or based on "outdated misconceptions concerning the role of females in the home rather than in the 'marketplace and world of ideas.' " * * * .

If the trial judge in this case had rendered his decision granting a new trial while uttering remarks that made it clear the underlying basis for his decision was his bias against an African-American defendant, there can be little doubt that the mere fact that the decision itself was grounded in the judge's discretionary power would be insufficient to insulate that decision from review. Nor can there be any doubt that the reviewing courts would be duty-bound by the Equal Protection Clause to overturn such a decision emanating as it did from impermissible racial bias. The same result should have occurred in the instant case where the decision emanated from impermissible gender bias.

A refusal to grant relief will force the victim to re-live this ordeal. Petitioner firmly believes that a grant of a

new trial under these circumstances constitutes a grave miscarriage of justice and will deny the victim her right as a citizen, according to Fourteenth Amendment due process, to a fundamentally fair trial. The female victim's right under Fourteenth Amendment equal protection to a proceeding free from the effects of impermissible gender bias would also be violated.

The result of the decision of the Michigan Court of Appeals and the denial of leave by the Michigan Supreme Court is to trample the rights of the victim in this case and to force her to undergo the agony and oppressive atmosphere of another trial simply because of the refusal of the appellate courts to reverse the decision of a biased trial judge. The victim will be treated unfairly because the criminal justice system will have allowed the jury's decision to be unfairly set aside due to the legally unsupportable decision of a jurist who, as determined by both the Michigan Judicial Tenure Commission and the Michigan Court of Appeals, displayed clear evidence of bias against the female victim and her female attorney. The effect of the lower court rulings upholding the trial court's grant of a new trial will be to violate the victim's right to due process and equal protection because the decision below will have been rendered by a biased jurist who has discriminated against the victim because of her gender. "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison, supra,* 349 U.S. at 136.

Petitioner is now requesting that this Honorable Court grant a writ of certiorari or other alternative summary relief and thereby declare that trial judges must

provide unbiased decision-making free from unconstitutional gender bias both in fact and in appearance.

CONCLUSION

WHEREFORE, Petitioner Richard Thompson, Prosecuting Attorney in and for the County of Oakland, by Richard H. Browne, Assistant Prosecuting Attorney, respectfully requests this Honorable Court to grant this petition for writ of certiorari to review the judgments of the Michigan Supreme Court and the Michigan Court of Appeals, or to grant summary reversal of those decisions and remand this case to the Michigan Court of Appeals for consideration of the issues raised in the appeals from Respondent's conviction and his sentencing.

Respectfully submitted,

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Date: April 25, 1995

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v TIMOTHY LEE HENSICK, Defendant-Appellant.	UNPUBLISHED June 9, 1994 No. 146734 LC No. 91-006537 FC
PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v TIMOTHY LEE HENSICK, Defendant-Appellee.	Nos. 147682; 159459 LC No. 91-006537 FC

Before: Griffin, P.J., and Cavanagh H.A. Koselka,* JJ.

PER CURIAM.

Defendant, an attorney, was convicted by a jury of three counts of first degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), for sexually assaulting the complainant, whom he was representing in a domestic matter at that time. Defendant was sentenced to serve eighteen months to ten years in prison. His sentence has been stayed pending the results of this appeal.

*Circuit judge, sitting on the Court of Appeals by assignment.

Defendant appealed his convictions as of right and requested a remand to the trial court in order to file a motion for new trial. Plaintiff also appealed as of right, challenging defendant's sentence. This Court remanded the matter to allow defendant to move for a new trial. After a hearing, the trial court granted defendant's motion. Plaintiff also appeals that decision as of right. We affirm.

The complainant had sought defendant's help in filing for a legal separation from her husband. She met with defendant once in January, 1990, and had a few telephone conversations with him. In the early morning hours of April 29, 1990, defendant telephoned the complainant and stated that he needed to see her. The complainant thought he wanted to see her about her legal problem and agreed to allow him to come to her apartment. According to the complainant, when he arrived at the apartment, defendant coerced her against the wall where he penetrated her vagina with his finger and coerced her into two acts of oral sex. Defendant testified that the sexual contact occurred but that it was consensual.

The administrator of the Livingston Area Council Against Spouse Abuse (LACASA) reported that the complainant called the hotline about the assault around 4:00 a.m. on April 29, 1990. The manager of the building where complainant lived, and his wife, testified to seeing the complainant in a very distressed condition in the evening of April 29, 1990. The complainant's sister testified to receiving a telephone call from her at about 5:00 p.m. on April 29, 1990. When the sister arrived at the complainant's apartment, she was crying, quivering, shaking and stuttering, and told her sister what had

happened. The next day, the complainant told her cousin, a Warren police officer, what had happened and he called the state police. The state police trooper took a report from the complainant on May 3, 1990. The trooper testified that the complainant had trouble verbalizing what had happened and would occasionally burst out crying.

Sharon Bloom, a psychologist, was asked to accept the complainant as a client as a result of the complainant's call to the LACASA hotline. She saw the complainant for about two and-a-half months at which time the complainant had not yet recovered from the incident. Dr. Theresa Mackey, a psychiatric nurse, began seeing the complainant as a referral patient in June, 1990. She described the physical and emotional trauma suffered by the complainant and testified that the complainant's symptoms are identical to those reported by many women who have been raped.

Testifying on behalf of the defense, an attorney, who spoke with the complainant on the telephone a couple of weeks after the assault, testified that, in response to his questions, the complainant stated that she guessed she was a willing participant. Further, Dr. Gary Stollak, a psychologist, opined that it would be impossible to separate out the complainant's difficult past from her interpretation of the event at issue here. Defendant also presented three individuals who stated that he had a reputation for honesty and was a law-abiding person.

In this opinion, we address the issues raised by the prosecutor in his appeal from the grant of defendant's motion for new trial. Because one of the errors upon which the trial court based its order is one which would

support appellate reversal of defendant's conviction and because other irregularities in the proceedings materially affected substantial rights of defendant, this Court cannot say that the trial court abused its discretion in granting defendant a new trial. *People v Jehnsen*, 183 Mich App 305; 454 NW2d 250 (1990).

The trial court rested its order granting new trial on three errors involving (1) plaintiff's expert witnesses, (2) failure to comply with discovery orders and (3) prosecutorial misconduct.

With regard to plaintiff's expert witnesses, Sharon Bloom and Dr. Mackey, the trial court found that it had erroneously allowed the witnesses to present hearsay statements of the complainant. Although defendant also argues that neither Bloom nor Mackey were properly admitted as expert witnesses, the trial court did not address this issue. For guidance of the trial court at the new trial in this case, this court finds that both Bloom and Mackey were properly qualified as expert witnesses. *Berryman v K Mart Corp*, 193 Mich App 88; 483 NW2d 642 (1992).

At trial, both Bloom and Mackey were allowed to testify regarding statements made to them by the complainant pursuant to MRE 803(4). MRE 803(4) is an exception to the hearsay exclusion for

> Statements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the

> cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment.

At trial, the trial court admitted the hearsay statements through both witnesses based on *In re Freiburger,* 153 Mich App 251; 395 NW2d 300 (1986), which held that the MRE 803(4) exception should not be found inapplicable merely because the witness is not a physician.

In granting defendant's motion for a new trial, the trial court found that the hearsay statements were not admissible relying on *People v Beckley,* 434 Mich 691; 456 NW2d 391 (1990), and *People v LaLone,* 432 Mich 103; 437 NW2d 611 (1989). The trial court's reliance on *Beckley* is misplaced because it did not address hearsay statements but was instead concerned with expert testimony on behavior patterns of sexually abused children. In *LaLone,* a child sexual abuse case, the Court held that hearsay statements which identified the assailant were inadmissible when made to a psychologist. Almost a year after the decision in *LaLone,* this Court applied *In re Freiburger* to allow an expert to testify to statements of the victim where the statements were made to the expert by the victim as part of the diagnosis and treatment of the victim. *People v James,* 182 Mich App 295; 451 NW2d 611 (1990). This Court found that an expert may testify that abuse took place so long as the expert does not opine that the victim was actually abused at a specific time and place. *Id.* at 298.

Using the above case law as a guide, this Court finds that the trial court incorrectly ruled Bloom's testimony inadmissible. Bloom scrupulously avoided naming the

assailant and did not opine, during the original examination by the prosecutor, that the victim was actually abused at a particular time and place. However, the trial court's ruling that Mackey's testimony was erroneously admitted at trial must be upheld. Mackey's testimony violated all of the above rules. It contained statements which identified the assailant and which would lead the jury to believe that, in Mackey's opinion, the complainant was telling the truth. In addition, the circumstances and timing of the complainant's statements to Mackey make such statements inherently unreliable. The trial court properly granted defendant's motion for new trial on this issue.

The second basis for the grant of the new trial was the prosecutor's failure to turn over to defendant prior to trial a letter written to the state trooper by the complainant's sister and a note made by Dr. Okun of the University of Michigan and contained in Dr. Mackey's files. The complainant's sister's letter contained a slightly different sequence of events regarding the alleged assault than had been testified to by the complainant. Dr. Okun's notes talked about complainant's prior history of abuse. Defendant argued that, because he did not have this information prior to trial, he was not able to secure a proper expert in rebuttal to the prosecutor's experts and was unable to fully prepare a defense.

A defendant is entitled to have produced at trial all evidence bearing on guilt or innocence that is within the prosecutor's control. *People v Calloway*, 169 Mich App 810, 820; 427 NW2d 194 (1988), vacated on other grounds 432 Mich 904 (1989). If evidence is suppressed, the proper consideration is whether (1) suppression was deliberate,

(2) the evidence was requested, and (3) in retrospect, the defense could have significantly used the evidence. *People v Paris*, 166 Mich App 276, 283; 420 NW2d 184 (1988). In the instant case, there is no dispute among the parties that all the evidence at issue was requested and that the prosecutor did not deliberately suppress the evidence. However, the evidence, especially Dr. Okun's notes, could have been more significantly used at trial if it had been delivered prior to the start of trial. In addition, the cumulative effect of the hearsay evidence above and the lack of prompt delivery of this evidence denied defendant a fair trial and supports the trial court's grant of a new trial.

Finally, the trial court in granting defendant's motion for new trial found that the prosecutor's one sentence in a twelve-page opening statement at the start of an eight-day trial so impermissibly commented on defendant's right to remain silent that it could not be harmless error. This Court must disagree. The sentence referred to by the trial court commented on defendant's desire to answer no more questions during the investigation stage of this case prior to his arrest. In *People v Cetlinski*, 435 Mich 742, 760; 460 NW2d 534 (1990), the Court stated that

> The use of a defendant's silence during contact with the police that does not occur "at the time of arrest in the face of accusation," [*People v Collier*, 426 Mich 23, 39 (1986)], for impeachment purposes does not violate the Fifth Amendment or the Michigan Constitution.

Therefore, the prosecutor did not err in her statement in opening argument. However, even if the argument could be considered erroneous, it could not possibly have

denied defendant a fair trial as it was one sentence at the beginning of a long trial and the statement was not used again during the entire trial.

The trial court found that the error could not be harmless because the prosecution's case was so weak. This Court disagrees. Unfortunately, the trial court's personal view of this case clouded its vision as to the relative strengths of the parties' cases.

In summary, as a result of the inadmissible hearsay statements in the testimony of Dr. Mackey and the cumulative effect of the failure to disclose the sister's letter and Dr. Okun's notes, the trial court did not abuse its discretion in granting defendant's motion for a new trial.

In light of the affirmance of the trial court's grant of defendant's motion for new trial, it is unnecessary to address defendant's issues in his original appeal or the prosecutor's appeal of defendant's sentence.

Because we believe the trial judge on remand would have substantial difficulty putting out of his mind his previously expressed views and findings, and to preserve the appearance of justice, retrial should be had before a different judge. *People v Winans,* 187 Mich App 294, 301; 466 NW2d 731 (1991).

Affirmed and remanded in accordance with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Harvey A. Koselka

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

No. 146734
LC No. 91-006537 FC

v

TIMOTHY LEE HENSICK,

Defendant-Appellant.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

No. 147862; 159459
LC No. 91-006537 FC

v

TIMOTHY LEE HENSICK

Defendant-Appellee.

Before: Griffin, P.J., and Cavanagh and H.A. Koselka,* JJ.

GRIFFIN, P.J. (dissenting).

I respectfully dissent. I would reverse the lower court order granting defendant's motion for a new trial and reinstate defendant's convictions.

Furthermore, I find the below the guidelines' minimum sentences of eighteen months to be disproportionately lenient and therefore invalid. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990), and *People v Lankey*

* Circuit judge, sitting on the Court of Appeals by assignment.

(After Remand), 198 Mich App 187; 497 NW2d 571 (1993). I would remand for resentencing before a different judge. *People v Evans*, 156 Mich App 68, 72-73; 401 NW2d 312 (1986).

I

The lower court judge clearly abused his discretion in granting defendant a new trial. I agree with the majority that the trial judge erred in granting defendant's motion based upon the testimony of Sharon Bloom and upon the prosecutor's alleged comment on defendant's right to remain silent. I disagree with my colleagues that reversible error occurred through the testimony of Nurse Theresa Foley Mackey, Ph.D., or by the prosecutor's untimely exchange of potential evidence.

Theresa Foley Mackey is a nurse employed at the University of Michigan School of Nursing. Nurse Mackey has a bachelor of science degree in nursing, a masters of science in nursing, and a Ph.D. in education. She is a specialist in mental health nursing.

In June 1990, the complainant sought treatment from Nurse Mackey for symptoms that the complainant related to the alleged rape. The symptoms included sleep disturbances, stress, fatigue, gastrointestinal disturbances, nausea, low back pain, and cognitive dysfunction. Nurse Mackey stated that she began complainant's treatment with an evaluation which included a patient history.

While testifying and relating the history given by the complainant, Nurse Mackey identified defendant as the alleged perpetrator of the crime. This hearsay evidence

was seized upon by the trial judge in granting defendant's motion for a new trial and is cited by the majority as one of their reasons for finding Nurse Mackey's testimony to be reversible error. I respectfully disagree.

In the present case, there was no disputes to the identity of defendant. Defendant's identity was not at issue. Defendant does not contest that he was with the complainant and that sexual acts occurred between them. Rather, it was defendant's position that the sexual acts were consensual. Under these circumstances the hearsay testimony of Nurse Mackey identifying defendant as the perpetrator was not prejudicial and therefore not error requiring reversal. MRE 103(a).

The more difficult issue is whether Nurse Mackey improperly vouched for the credibility of the complainant. When viewed in context, I find no error requiring reversal. MRE 803(4) and *People v Meeboer (After Remand)*, 439 Mich 310; 484 NW2d 621 (1992). Nurse Mackey expressed her opinion that the physical symptoms that the complainant was experiencing were related to the rape based upon the history as given by the complainant. Further, Nurse Mackey testified that such symptoms are common for rape victims who have suffered traumatic experiences. I find such statements to be within the field of expertise of Nurse Mackey. MRE 702.

Moreover, the alleged error regarding this testimony is nonconstitutional in nature. As such, "the defendant must show a reasonable probability that the error affected the outcome of the trial." *People v Hall*, 435 Mich 599, 609, n 8; 460 NW2d 520 (1990). After thorough review, I am convinced that the disputed testimony had little or no

affect on the verdict. Accordingly, if error occurred by the admission of this testimony, I would hold the error to be harmless. *People v Mosko,* 441 Mich 496, 502-503; 495 NW2d 534 (1992); MCL 769.26; MSA 28.1096; MCR 2.613(A).

Finally, I find no prejudice resulting from the late exchange of the letter written by the complainant's sister and the note of Dr. Okun. Defendant was entitled to a fair trial, not necessarily a perfect one. *Delaware v Van Arsdall,* 475 US 673, 681; 106 S Ct 1431; 89 L Ed 2d 674 (1986), *People v Van Tassel (On Remand),* 197 Mich [App] 653, 655; 496 NW2d 388 (1992). Defendant received a fair trial.

II

Defendant was sentenced to concurrent terms of eighteen months to ten years' imprisonment for three counts of first-degree criminal sexual conduct. MCL 750.520b; MSA 28.788(2). The sentences imposed by the lower court were a dramatic downward departure from the minimum sentences recommended by the sentencing guidelines.

In my judgment, the reasons relied upon by the trial judge for departing from the sentencing guidelines were blatantly inappropriate and unwarranted. I would reverse the disproportionately lenient sentences, *Lankey, supra,* and remand for resentencing before a different judge. *Evans, supra.*

/s/ Richard Allen Griffin

Order
Entered: January 25, 1995

Michigan Supreme Court
Lansing, Michigan

James H. Brickley
Chief Justice

Charles L. Levin
Michael F. Cavanagh
Patricia J. Boyle
Dorothy Comstock Riley
Conrad L. Mallett, Jr.
Elizabeth A. Weaver
Justices

100068-70

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

TIMOTHY LEE HENSICK,

Defendant-Appellee.

SC 100068-70
CoA 159459, 146734, 147862
LC 91-6537-FC

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

Boyle, J., states as follows:

I dissent. I would grant leave to appeal. No finding was made at trial that the prosecutor was aware of information that was not made available to defendant. The defendant had knowledge of the fact that complainant had a prior history of abuse before trial, received all the information in Dr. Theresa Foley Mackey's file during

trial, was offered the opportunity to recall the complainant and declined to do so, did not then seek a continuance, and actually presented the material to the jury. Given this context, leave should be granted to determine whether the testimony of witness Mackey was error requiring reversal, to determine whether there was any violation of a discovery order, and, if so, whether defendant was prejudiced.

Weaver, J., concurs in the dissenting statement of Boyle, J.,

Mallett, Jr., J., would grant leave to appeal

[SEAL]

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

January 25, 1995 /s/ Corbin R. Davis

No. 94-1766

Supreme Court, U.S.
FILED
MAY 26 1995
CLERK

In The

Supreme Court of the United States

October Term, 1994

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

vs.

TIMOTHY LEE HENSICK,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals for the State of Michigan

RESPONDENT'S BRIEF IN OPPOSITION

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RESTATEMENT OF THE QUESTION PRESENTED

Whether granting the Respondent's motion for a new trial by a trial judge who responded to the legal issues posed by that motion may be set aside because of an unresolved allegation by Petitioner that the trial judge granted the new trial because of an alleged bias against the complainant?

LIST OF PARTIES

Petitioners are the People of the State of Michigan, represented by the Prosecuting Attorney for Oakland County, Michigan. Respondent is Timothy Lee Hensick, a resident of Livingston County, Michigan.

TABLE OF CONTENTS

	Page
Restatement of the Question Presented	i
List of Parties	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Statement of Jurisdiction	1
Restatement of the Case	1
A. The Judicial Tenure Complaint	7
B. The Trial Court's Decision Upon Respondent's Motion for a New Trial	9
C. Appeals Taken by the Parties	10
Summary of the Argument	13
Reasons for Denying the Writ	14
I. The instant Petition for Certiorari should be denied because the issue posed therein was not raised in the court whose opinion is being challenged.	14

Contents

Page

II. The instant Petition for Writ of Certiorari should be denied because the decision of the trial judge and the Michigan Court of Appeals was a proper construction of Michigan law, and there was (and is) no contention made by Petitioner herein that the Court of Appeals judges were in any fashion biased for Respondent or against the complainant. 15

III. The instant Petition for Writ of Certiorari should be denied because the case law offered by the Petitioner does not support the relief requested. .. 20

Conclusion 24

TABLE OF CITATIONS

Cases Cited:

Benmark v. Steffen, 9 Mich. App. 416, 157 N.W. 2d 468 (1988) 18

Cardinale v. Louisiana, 394 U.S. 437, 22 L. Ed. 2d 398, 89 S. Ct. 1162 (1969) 14

Kailimai v. Firestone Tire & Rubber Company, 398 Mich. 230, 247 N.W. 2d 295 (1976) 18

Morris v. Slappy, 461 U.S. 1, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983) 20, 21, 22

People v. Hampton, 407 Mich. 354, 285 N.W. 2d 284 (1979) 16

Contents

Page

People v. Herbert, 444 Mich. 466, 511 N.W. 2d 654 (1993) 19

People v. Rayford Johnson, 52 Mich. App. 385, 217 N.W. 2d 417 (1974), *reversed,* 391 Mich. 834, 218 N.W. 2d 378 (1974) 17

People v. Rayford Johnson, 397 Mich. 686, 246 N.W. 2d 836 (1976) 18

Tacon v. Arizona, 410 U.S. 351, 35 L. Ed. 2d 346, 93 S. Ct. 998 (1973) 14

United States v. Hastings, 461 U.S. 499, 103 S. Ct. 1974, 76 L. Ed. 2d 96 (1983) 20, 23

United States v. Mechanik, 475 U.S. 66, 106 S. Ct. 938, 89 L. Ed. 2d 50 (1986) 20, 21, 22

Willett v. Ford Motor Company, 400 Mich. 65, 253 N.W. 2d 111 (1977) 18, 19

Statutes Cited:

28 U.S.C. § 1257(a) 1

M.C.L. 770.1 ..... 16, 17

Rules Cited:

Federal Rule of Criminal Procedure 6(d) 20

Michigan Court Rule 6.431(B) 16, 17

Contents

Page

APPENDIX

Appendix A — Excerpts of Transcript of Proceedings Dated November 25, 1991 ..... 1a

Appendix B — Excerpts of Formal Complaint No. 48 ... 23a

Appendix C — Excerpts of Master's Findings of Fact, Conclusions Dated December 28, 1994 ..... 27a

Appendix D — Decision and Recommendation for Order of Discipline Dated April 12, 1995 ..... 32a

Appendix E — Opinion Regarding Defendant's Motion for New Trial Filed November 18, 1992 ..... 40a

Appendix F — Order Granting Defendant's Motion for New Trial Filed November 25, 1992 ..... 62a

Appendix G — Oral Argument and Statement of Issue Presented 65a

Appendix H — Excerpts of Plaintiff's Brief 67a

Appendix I — Appellant's Application for Leave to Appeal Dated June 30, 1994 ..... 79a

Appendix J — Delayed Motion for Reconsideration of the Supreme Court of the State of Michigan Dated February 24, 1995 ..... 82a

TO THE HONORABLE SUPREME COURT:

The Respondent, Timothy Lee Hensick, respectfully requests that this Court deny the Petition for Writ of Certiorari filed by Petitioner herein on April 25, 1995.

OPINIONS BELOW

The opinion Petitioner seeks to have reviewed is a June 9, 1994 unpublished opinion of the Michigan Court of Appeals, which is set forth at pages 1 through 12 of Petitioner's Appendix. That opinion addressed the propriety of the trial court's November 13, 1992 29-page Opinion and November 24, 1992 Order granting the Respondent's post-trial motion for a new trial. As described in more detail below, Petitioner did not, in its appeal of that order to the Michigan Court of Appeals, raise the issue it now poses to this Court.

STATEMENT OF JURISICTION

Petitioner invoked the jurisdiction of this Court under "28 U.S.C. § 1257(3)." Presumably, Petitioner meant 28 U.S.C. § 1257(a). Respondent contests the Petitioner's right to invoke this Court's jurisdiction. The issue posed in the instant petition was not appropriately raised in the Michigan Court of Appeals. Therefore, a resolution of that issue was neither necessary to the decision reached by that Court, nor was it in fact adjudicated by that Court.

RESTATEMENT OF THE CASE

Respondent does not believe that Petitioner's Statement of Facts contains a fair description of all of the facts which are material to the consideration of the question posed by the instant petition.

This case arose out of a sexual incident which occurred at the complainant's apartment during the early morning hours of April 29, 1990. Prior to that incident, the Respondent was, as Petitioner alleges, an attorney, who, in early 1990, had been hired by the complainant to help her in a divorce/separation action against her husband.

During the trial, the Respondent testified that prior to April 29, 1990 he had concluded that the complainant had developed a personal interest in him (08/29/91 Tr., p. 58). He also testified that he was, in early 1990, experiencing marital problems of his own. He called the complainant at approximately 2:00 a.m. on April 29, 1990 to ask her if he could visit her at her apartment (08/29/91 Tr., p. 61). He testified that he did not know where her apartment was located, that the complainant agreed to his request, and that she gave him directions to her apartment (08/29/91 Tr., p. 62).

The complainant testified at the trial that she had not developed a personal interest in the Respondent, and that she thought his early morning call on April 29, 1990 was related to her legal matter.

The Respondent drove to the complainant's apartment. He knocked on her door. He was admitted by the complainant. He was aware that the complainant had a minor child. It was not contested at the trial that he was not told by the complainant that her son was not sleeping in her apartment, until **after** the sexual incident had occurred.

What occurred after the Respondent was admitted to the complainant's apartment was the object of intense scrutiny during the trial. As suggested by the instant petition, the complainant testified that she did not consent to any of the sexual activity which occurred. The Respondent testified that she did, and most of the evidence offered during the multi-day trial

focused upon what the complainant had told others about the incident in the hours and days after the incident.

The presiding judge, of course, heard all of that evidence. He observed the witnesses as they offered it, and he made his rulings upon challenges to the evidence as it was offered. At no time **during the trial** did the Prosecutor object to the way the trial judge treated the complainant, or to the judge having exhibited any personal favoritism towards the Respondent. In fact, the Prosecutor has **never** contended that the trial court was discourteous or in any fashion personally mistreated the complainant because of any sexual or gender bias.

Defense counsel, in July, 1990, over a year before the trial, asked the Prosecutor for copies of all documents related to the police investigation, the complainant's medical/psychological status, and for any other material touching upon her prior statements about the incident and the alleged impact of the incident upon her.[1] During the August, 1991 trial, after the complainant had testified (and after she had been recalled to testify because of an in-trial disclosure by the Prosecutor of a June, 1990 letter written to the investigating officer by her sister describing the complainant's version of the incident), it was learned that hospital and related mental health documents in the possession of the prosecution's main psychological expert had not been turned over to defense counsel, despite a specific pretrial order requiring such materials to be turned over. Defense counsel had contended that earlier failures of this sort had prejudiced his client's right to prepare for trial, and to effectively cross-examine the complainant and other prosecution witnesses. He renewed that objection at trial.

Several other legal issues arose during the trial, some of

1. Under Michigan law, psychological damage to a rape victim can be an element of the crime of criminal sexual conduct in the first degree.

which became the object of the Court of Appeals decision now at issue. As noted in the instant petition, evidence was offered during the trial that the complainant had called a rape counseling center (at which she had been counseled about her problems with her husband) almost immediately after the Respondent left her home on April 29, 1990. She was questioned about the incident by a person who testified that she clearly understood the significance of what the complainant said about the incident. The complainant told the counselor that no force was used. Instead, she said that he "persistently asked or requested" her to engage in sexual acts (08/22/91 Tr., p. 18). During a July, 1990 pretrial hearing, the complainant verified that the counselor's report to that effect was accurate, and this testimony was repeated by her during the trial. The complainant's only explanation for that statement, was, as suggested in the instant Petition, an explanation (offered after her pretrial confirmation of the accuracy of the contemporaneous report), that she felt she had to be struck in order for "force" to be the operable word to describe the incident.

Testimony was also offered during the trial that the complainant had told markedly different stories about the April 29, 1990 incident to several of her friends and relatives in the hours and days after the incident. Mark Lyon, an attorney the complainant's brother asked to take over the divorce/separation case for the complainant called her on May 3, 1990. He testified at trial that during that May 3, 1990 conversation, he asked the complainant about the incident with the Respondent. His testimony about that conversation was as follows:

> I asked Tina what turned out to be three questions. My phone conversation started by saying, "Tina, this is hard for me to believe. This is a very serious thing that you're alleging. It has potentially immense consequences to a lot of people, and I want to

> ask you," I said, "Did the man force you or use any force in any way in what you alleged happened?" Her answer to me was, "No." I asked her, "Tina, did the man threaten you in any way to get you to do what your brother alleged he did?" And she said, "No." And then I said, "Well, Tina, it sounds to me like you were a willing participant in this thing."
>
> Q. What did she say?
>
> A. There was a hesitation of a couple of seconds, and she said, "Well, I guess I was."

(08/28/91 Tr., p. 158).

The jury convicted the Respondent after deliberating for portions of three (3) days. On November 25, 1991, the trial judge sentenced the Respondent to three (3) concurrent terms of imprisonment for from 18 to 120 months. In 1991, Michigan had "sentencing guidelines" in place. For the crime of CSC-lst degree, the low end of the recommended range of months in prison per those guidelines was higher than 18 months. As required by existing Michigan case law, the trial judge placed his reasons for departing from the range yielded by application of the guidelines on the record at the time he imposed his sentence.

In addition, as he is entitled to do under Michigan law, Respondent asked the trial judge to establish a bond pursuant to which he could remain free while pursuing his post-trial, post-sentence appellate remedies. Under Michigan law, the trial judge, in considering such a request, must address two (2) issues, *i.e.*:

> (1) whether the defendant represents a threat to society if allowed to post bond pending the outcome of his/her appeal; and

(2) whether he/she believes there are substantial legal issues to be resolved on appeal.

The trial judge made his findings on all three (3) of these issues on November 25, 1991—the day of sentencing. As regards his explanation for imposing a sentence below the sentencing guidelines range, the trial judge offered as one of his reasons, an opinion that the Prosecutor's case was:

> . . . the weakest criminal case that resulted in a conviction that I've ever seen, and I've been an attorney for 15 years, 14 of which I was a prosecuting attorney.

(Appendix 12a). In total, the trial judge offered 11 reasons why he felt the sentence he imposed was "proportionate" to the offense and the offender as required by Michigan law (Appendix 11a to 14a).

In the context of addressing Respondent's counsel's request for bond pending the filing of an appeal and/or motion for a new trial, the presiding judge addressed the issue of whether there were substantial legal issues to be addressed in that appeal (Appendix 20a to 22a). In recounting those potential issues, the trial judge said:

> Another issue, which is the crux of my granting an appeal bond, is the severity of the weakness of the prosecutor's case; that is, if this Court sat without a jury and did its duty, it was clear that the Prosecution failed to prove the case beyond a reasonable doubt. I would have acquitted this Defendant. That raises the issue in connection with the other issues that I've listed. I believe there's a substantial issue

> of law as to whether a jury's verdict in this case was a miscarriage of justice. And, if that's not a substantial issue for appeal, I don't know what is.
>
> Motion for appeal bond is granted.

(Appendix 21a to 22a). The Prosecutor filed a claim of appeal from the November 25, 1991 sentence with the Michigan Court of Appeals on January 6, 1992. No brief was filed in support of that appeal until January 21, 1993, *i.e.*, well after the deadline for such a brief, and well after the trial judge had granted the Respondent's motion for a new trial. No due process or equal protection argument was advanced in that brief in behalf of the complainant.

A. The Judicial Tenure Complaint

On May 12, 1994, persons unrelated to this case filed an administrative grievance against the trial judge with the Michigan Judicial Tenure Commission. As a part of that grievance process, it was alleged that the trial judge was inappropriately rude to the Prosecutor during the November 25, 1991 sentencing in this case, and that **some of his reasons** for imposing a sentence below the applicable guidelines recommendation were inappropriate (Appendix 23a to 26a). Respondent was not and never has been a party to the Judicial Tenure complaint, hearings, or findings.

Several issues totally unrelated to the instant case were investigated in the Judicial Tenure matter, which is still pending before the Michigan Supreme Court.

The "Master," a retired judge who was directed to hear evidence and make findings in the Judicial Tenure matter, found that the trial judge ". . . had every right to reduce the sentence if

that was his feeling . . . ." (Appendix 29a). The Master did conclude that some of the reasons he offered for that reduction were ". . . most unfortunate, even bizarre" (Appendix 28a). The Master also concluded that the exchange between the Prosecutor and the trial judge at the sentencing represented an instance when ". . . courtesy was lost and rudeness took over" (Appendix 30a). The Master made no finding that the trial judge possesses a "gender bias" (Appendix 31a).

The Judicial Tenure Commission, the body to which the Master's findings were reported, agreed with the Master that the trial judge had every right to sentence the Respondent as he had done (Appendix 34a). However, a majority of the Commission concluded that some of the reasons given by the sentencing judge for his downward deviation from the sentencing guidelines were insensitive, and that they:

> . . . showed a certain obvious lack of sensitivity toward the feeling of women generally.

(Appendix 34a). The majority of the Commission also found that these reasons:

> . . . strongly suggest impermissible gender bias by implying the victim was somehow responsible for or invited the assault.

(Appendix 34a to 35a). The majority of the Commissioners' ultimate finding upon the "gender bias" issue was as follows:

> We find strong indication of a pattern of gender bias in Respondent's conduct, but since the complaint did not formally charge a pattern of gender bias, **we make no finding in this regard.**

(Emphasis added) (Appendix 37a).

The minority portion of the Judicial Tenure Commission's recommendation to the Michigan Supreme Court concluded that the trial judge's comments during the November 25, 1991 sentencing hearing related to the Respondent's state of mind, not the complainant's conduct, and, therefore, these comments were not felt to be any evidence of gender bias (Appendix 38a).

The Commission's findings are presently before the Michigan Supreme Court, which must make its final findings, and impose whatever sanctions it deems appropriate, if any. Nothing the Supreme Court will do in the Judicial Tenure context will have any bearing upon, or change its decision to decline to review the Court of Appeals' decision of June 9, 1994.

B. The Trial Court's Decision Upon Respondent's Motion for a New Trial

The trial judge, in his November 13, 1992 "Opinion Regarding Defendant's Motion for a New Trial" rejected several of the Respondent's reasons for seeking a new trial. He did, however, make four (4) legal findings which he said convinced him that the trial and resultant verdict constituted a miscarriage of justice so as to require him to grant a new trial pursuant to the applicable Michigan statute (Appendix 42a to 61a). Those four (4) findings involved the testimony of two (2) "expert" witnesses who were permitted to offer opinion testimony, and, more specifically, to testify to their conclusions about the conclusions the complainant described to them concerning her (the complainant's) reaction to the sexual incident. As to both witnesses, the trial judge concluded that their testimony was, upon reflection, so unreliable as to not have been admissible under applicable Michigan (hearsay) law in this context (Appendix 48a to 51a).

The trial judge also found that the Prosecutor's failure to turn

over exculpatory psychological records, and other exculpatory documents prior to and during the trial had prejudiced the Respondent's right to challenge the credibility of the complainant, the most crucial witness called by the Prosecutor (Appendix 51a to 56a).

Finally, the trial judge held that the Prosecutor had purposefully and inappropriately commented upon the Respondent's refusal to answer an investigating officer's questions during her opening statement (Appendix 00a). His order granting the Respondent's motion for a new trial was entered on November 24, 1992 (Appendix 62a to 65a).

C. Appeals Taken by the Parties

(1) On November 25, 1991, the day Respondent was sentenced, he filed a claim of appeal from his conviction. That appeal was assigned Court of Appeals File No. 146734.

(2) On January 6, 1992, the Prosecutor filed a claim of appeal from the trial court's sentence. That appeal was assigned Court of Appeals File No. 147862. It was consolidated with File No. 146734 on January 23, 1992.

(3) On December 5, 1992, the Prosecutor filed an application for leave to appeal from the trial court's November 24, 1992 Order granting the Respondent's motion for a new trial. That request was granted by the Court of Appeals on January 22, 1993. That appeal was assigned Court of Appeals File No. 159459. It was consolidated with File Nos. 146734 and 147682 for purposes of oral arguments and a decision.

The Prosecutor's brief in File No. 159459, *i.e.*, the appeal from the trial court's order to grant a new trial, posed as the only issue the Michigan Court of Appeals was to resolve:

WHETHER JUDGE HOCKING ABUSED HIS DISCRETION BY GRANTING A NEW TRIAL WHERE THE GROUNDS CITED FOR THIS EXTREME FORM OF RELIEF CLEARLY DO NOT SUPPORT THIS REMEDY.

(Appendix 66a). The Prosecutor's brief thereafter discussed each of the four (4) issues the trial judge had relied upon in granting Respondent's motion for a new trial. The only time the Prosecutor's argument touched upon a contention that the trial judge was "gender biased" was in the context of attacking his ruling that the Prosecutor had improperly commented upon Respondent's refusal to answer an investigating officer's questions. The Prosecutor's argument upon that issue was, essentially, that during the sentencing hearing, the trial judge had said that he would have acquitted the Respondent had the case been tried without a jury, and that his reasons for reducing the sentence were a function of his anger that the jury had convicted the Respondent, and his:

> . . . archaic view of women and their sexual relationships with men. . . .

(Appendix 76a). No contention was made in the Prosecutor's brief on appeal, or during the oral arguments before the Michigan Court of Appeals, that the complainant was deprived of **her constitutional rights** to due process and/or equal protection of the law because of anything that the trial judge had said or done during the trial, or at the subsequent hearings.

The Michigan Court of Appeals found that the trial judge had not abused his discretion in granting the Respondent's motion for a new trial. It disagreed with two (2) of the four (4) reasons the trial judge had based his decision upon, but it held that the trial

judge acted within his discretion by finding that the testimony of one of the expert witnesses was improperly admitted, and by finding that the Respondent's right to a fair trial had been prejudiced by the Prosecutor's failure to turn over exculpatory materials prior to trial.

When the Prosecutor (Petitioner herein) filed its original June 30, 1994 application for leave with the Michigan Supreme Court, it did not raise the issue posed in its instant Petition. Instead, the Prosecutor simply asked the Michigan Supreme Court to reconsider the same issue the Court of Appeals had addressed in its June 9, 1994 decision, *i.e.*, whether the trial court had abused his discretion in making the four (4) findings he had made in support of his decision to grant the Respondent's motion for a new trial, and whether the Court of Appeals had erred in affirming two (2) of those findings (Appendix 79a to 81a). After the Michigan Supreme Court, on January 25, 1995, declined to review those issues, the Prosecutor, on February 21, 1995, filed a "Delayed Motion for Reconsideration" with the Michigan Supreme Court. In that motion, the Prosecutor argued, **for the first time,** that it would be unfair to the complainant to require her to "re-live this ordeal" by having to testify at a new trial. In that motion the Prosecutor also (incorrectly) alleged that the Judicial Tenure Commission:

> . . . has determined that the trial judge who ordered the new trial in this case was biased **against the female victim and against the female Prosecutor who tried this case.**

(Emphasis added) (Appendix 83a).

Significantly, the Prosecutor's February 21, 1995 delayed motion for reconsideration also **affirmatively** alleged that the instant "issue" had **not** been considered by the Court of Appeals, *i.e.:*

> In arriving at its decision in this case, the Court of Appeals **did not** consider the trial judge's improper bias or the victim's and the prosecution's right to a decision on the motion for a new trial by an unbiased judge. There can be no dispute that if a trial judge was shown to be biased against a defendant, any appellate court would immediately reverse an outcome determinative ruling by that judge against the defendant.

(Appendix 83a). The Michigan Supreme Court declined to hear the Prosecutor's delayed motion for reconsideration because it was not filed in a timely fashion. The instant Petition is the Prosecutor's response to that ruling.

SUMMARY OF THE ARGUMENT

The issue posed by the instant petition was not raised below. Also, the opinions of the trial judge and the Michigan Court of Appeals constitute proper applications of existing Michigan law. The Court of Appeals' decision constituted a simple finding that the trial judge did not abuse the discretion Michigan law vests in trial judges by re-examining legal issues raised in a motion for a new trial, and by concluding that one or more of those issues required such a result. Moreover, there is no contention made by Petitioner herein that the Court of Appeals was gender biased or in any fashion biased against the complainant. Finally, the Supreme Court cases offered by Petitioner do not support the legal contention it makes herein.

REASONS FOR DENYING THE WRIT

I.

THE INSTANT PETITION FOR CERTIORARI SHOULD BE DENIED BECAUSE THE ISSUE POSED THEREIN WAS NOT RAISED IN THE COURT WHOSE OPINION IS BEING CHALLENGED.

Petitioner's constitutional "issue," in addition to being premised upon an unsupported factual assertion that the reason the trial judge below granted Respondent's motion for a new trial was his bias in favor of Respondent and against the complainant, is being raised for the first time in the instant petition. This Court has consistently declined to decide federal constitutional questions in state court matters which are raised for the first time before it, *Cardinale v. Louisiana,* 394 U.S. 437, 22 L. Ed. 2d 398, 89 S. Ct. 1162 (1969); *Tacon v. Arizona,* 410 U.S. 351, 35 L. Ed. 2d 346, 93 S. Ct. 998 (1973), and cases cited therein. As noted in *Cardinale,* and as this case proves, there are sound reasons for this rule, *i.e.:*

> Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind.

Id. p. 439.

Not only was no affirmative factual or legal record made below concerning the constitutional issue now asserted by Petitioner, the record which was made, in terms of why the trial judge granted the Respondent's motion for a new trial, adequately and affirmatively establishes that his reasons had nothing to do with any alleged bias in favor of the Respondent, or any alleged bias against the complainant (*see* § II, below).

Petitioner would, apparently, have this Court simply accept its factual contention that the trial judge granted Respondent's motion for a new trial because he was biased against the complainant and for the Respondent, based upon its generalized conclusions about a separate administrative process (the Judicial Tenure Commission matter) which involved several unrelated issues, and which never addressed the conclusion now asserted by Petitioner.

It takes very little imagination to foresee what could and probably would happen if prosecutors or defendants could invoke this Court's jurisdiction by alleging, for the first time in this Court, that the reason a ruling went against them in a state court proceeding was because the trial judge was biased against the complainant or the defendant, simply because he/she had been subsequently accused of bias by others.

Respondent, therefore, respectfully asks this Court to decline to grant Petitioner's Petition for Writ of Certiorari because it fails to properly invoke this Court's jurisdiction.

II.

THE INSTANT PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE DECISION OF THE TRIAL JUDGE AND THE MICHIGAN COURT OF APPEALS WAS A PROPER CONSTRUCTION OF MICHIGAN LAW, AND THERE WAS (AND IS) NO CONTENTION MADE BY PETITIONER HEREIN THAT THE COURT OF APPEALS JUDGES WERE IN ANY FASHION BIASED FOR RESPONDENT OR AGAINST THE COMPLAINANT.

Under relevant Michigan statutory law, as well as under relevant court rules and case law, a defendant who believes that legal errors were committed during a trial which resulted in his/

her conviction may ask the trial judge to order that a new trial be conducted.

M.C.L. 770.1 provides:

> NEW TRIAL; Reasons for granting.
>
> The judge of a court in which the trial of an offense is held may grant a new trial to the defendant, for any cause for which by law a new trial may be granted, or when it appears to the court that justice was not done, and on terms or conditions as the court directs.

Michigan Court Rule (M.C.R.) 6.431(B) provides:

Reasons for Granting.

> On the defendant's motion, the court may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice. The court must state its reasons for granting or denying a new trial orally on the record or in a written ruling made a part of the record.

In *People v. Hampton,* 407 Mich. 354, 285 N.W. 2d 284 (1979), the Michigan Supreme Court interpreted M.C.L. 770.1 as follows:

> Under this statute, a new trial may be granted if the trial judge finds that the guilty verdict was not in accordance with the evidence introduced, and that an injustice has been

> done. *People v. Henssler,* 48 Mich. 49, 51; 11 N.W. 804 (1882), *People v. Rayford Johnson,* 391 Mich. 834; 218 N.W.2d 378 (1974).

These holdings and rules say, essentially, that if a trial judge draws one of two conclusions as a result of having observed a criminal trial which resulted in a conviction, he/she may, as a part of his/her discretionary powers, grant a defendant's motion for a new trial, *i.e.:*

> (1) if he/she believes that a legal error was committed which would/will result in an appellate reversal; or
>
> (2) if he/she, in the exercise of his/her discretion, concludes that the evidence simply did not warrant a conviction, *i.e.,* that it did not "do justice" as per M.C.L.A. 770.1, or that the guilty verdict "... resulted in a miscarriage of justice" as per M.C.R. 6.431(B).

The Michigan Supreme Court has affirmed a trial judge's decision to grant a new trial when that trial judge's explanation for doing so consisted of the following statement:

> I don't hesitate to say that had I tried this case without a jury, I could not, consistent with my oath as a judge, have concluded that either one of these defendants was guilty beyond a reasonable doubt.

People v. Rayford Johnson, 52 Mich. App. 385, 388, 217 N.W. 2d 417 (1974), *reversed,* 391 Mich. 834, 218 N.W. 2d 378 (1974).

When that rationale for granting a new trial was sustained by Michigan's Supreme Court in the 1974 *Johnson* case, the prosecutor, upon remand, asked the trial judge to disqualify

himself. He refused. The prosecution then stated that its proofs would be the same in the retrial as they had been in the original trial. The defendant asked for a dismissal and the trial judge granted that request. On appeal, the Michigan Supreme Court reversed that ruling. It held that while a trial judge may grant a **new trial** because of his/her belief that justice was not done, he/she may not grant a **motion to dismiss the charges** because of that belief. *People v. Rayford Johnson,* 397 Mich. 686, 246 N.W.2d 836 (1976).

Thus, there can be no question about the trial court in this case having been authorized, by existing Michigan law, to have granted Respondent's motion for a new trial if he (the trial judge) believed, as he said he did in his November 13, 1992 Opinion, that a miscarriage of justice had occurred at the trial.

When the Michigan Court of Appeals was asked to review the trial judge's decision to grant Respondent's motion for a new trial, Michigan case law made it very clear that the appellate court reviewed that decision from an "abuse of discretion" perspective. The practical implications of that "abuse of discretion" standard, per Michigan law, are that an appellate court, in deciding whether a trial court abused his/her discretion in **granting** a defendant's motion for a new trial, should decide:

> (1) whether the reasons the trial court gave for his/her ruling were legally recognized as reasons for granting a new trial, and, if so,
>
> (2) whether the reasons he/she gave were supported by **any reasonable** interpretation of the trial record, as opposed to being predicated upon conjecture or mere possibility. *Benmark v. Steffen,* 9 Mich. App. 416, 157 N.W. 2d 468 (1988); *Kailimai v. Firestone Tire & Rubber Company,* 398 Mich. 230, 232, 247 N.W. 2d 295 (1976); and *Willett v. Ford*

Motor Company, 400 Mich. 65, 70-71, 253 N.W. 2d 111 (1977).

The Michigan Supreme Court, as recently as December, 1993, has affirmed the right of a trial judge to grant a new trial when he/she concluded that the result of the trial was a miscarriage of justice, and, more importantly, the Michigan Supreme Court acknowledged that a trial judge, in exercising his/her discretion vis-a-vis considering a motion for a new trial is authorized to consider the credibility of the witnesses. *People v. Herbert,* 444 Mich. 466, 475-477, 511 N.W. 2d 654 (1993).

Thus, not only was the trial court in this case well within his rights to grant a new trial to Respondent for the reasons he articulated in his opinion, he was also entitled to consider the credibility of the prosecution's witnesses in making that decision, including the credibility of the complaining witness.

The Michigan Court of Appeals, in evaluating the trial judge's decision to grant Respondent's motion for a new trial, specifically found that two (2) of the four (4) reasons the trial judge had given to support his conclusion that a miscarriage of justice had occurred at the trial were legally recognized as reasons for granting a new trial, and, further, that the record of the trial supported the trial judge's conclusion that such errors had occurred, and, accordingly, that the Respondent had been deprived of his right to a fair trial.

No contention has ever been made by Petitioner, either to the Michigan Supreme Court or to this Court, that the Court of Appeals decision was a product of bias by the Court of Appeals judges against the complainant or for the Respondent. The Court of Appeals, quite simply, applied Michigan law, and affirmed the trial court's discretionary call—without regard to any alleged bias exhibited by the trial court.

III.

THE INSTANT PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE CASE LAW OFFERED BY THE PETITIONER DOES NOT SUPPORT THE RELIEF REQUESTED.

The Petitioner's bottom iine appeal in this matter is that because this Court has, in explaining its holdings upon other legal issues, voiced concern about the practical effects of having to retry emotional and bitterly contested cases, this case cannot or should not be retried. To support this remarkable assertion, Petitioner offers edited language from three (3) cases decided by this Court, *i.e.:*

(1) *United States v. Mechanik*, 475 U.S. 66, 106 S. Ct. 938, 89 L. Ed. 2d 50 (1986);

(2) *Morris v. Slappy*, 461 U.S. 1, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983); and

(3) *United States v. Hastings*, 461 U.S. 499, 103 S. Ct. 1974, 76 L. Ed. 2d 96 (1983).

None of these cases involve a claim remotely similar to or analogous to the instant factual claim that a "biased" judge's decision to grant a new trial deprives a complainant of her right to due process and equal protection.

In *Mechanik,* the issue was whether a violation of Rule 6(d) of the Federal Rules of Criminal Procedure based upon joint testimony of government agents before a grant jury merited an **automatic** reversal of a jury verdict, regardless of any proof of prejudice to the defendants. The "social cost" quotation from the *Mechanik* case offered by the Petitioner herein was made in the

context of an absence of prejudice to the defendant's right to a fair trial. This Court noted, as a part of that discussion, that:

> These societal costs of reversal and retrial are an acceptable and often necessary consequence when an error in the first proceeding has deprived a defendant of a fair determination of the issue of guilt or innocence. But the balance of interest tips decidedly the other way when an error has had no effect on the outcome of the trial.

Id. p. 72.

Thus, instead of supporting Petitioner's position, the *Mechanik* case undercuts it, because here, unlike in that case, there has been a finding by both the trial court and the Court of Appeals that trial errors deprived Respondent of a fair determination of the issue of guilt or innocence.

The *Morris v. Slappy* quotation represents an even more blatant effort to inject a plausible sounding contention by selectively editing out the thrust of this Court's finding. The issue in *Morris* was whether the defendant had been deprived of his right to counsel, because of a last minute substitution of one public defender for another. The second defender had stated that he was prepared to proceed before the trial began—contrary to what his client had contended. The Court of Appeals reversed the California and United States District Court's affirmations. It held that an accused has a right to a "meaningful relationship" with his/her counsel. This Court reversed, holding that the Sixth Amendment does not guarantee such a relationship. In explaining that decision, the language selected by Petitioner herein was offered. The **entire** quote, vis-a-vis the interest of a victim in not having to go through a third trial, was as follows:

> In its haste to create a novel Sixth Amendment right, the court wholly failed to take into account the interest of the victim of these crimes in not undergoing the ordeal of yet a third trial in this case. **Of course, inconvenience and embarrassment to witnesses cannot justify failing to enforce constitutional rights of an accused; when prejudicial error is made that clearly impairs a defendant's constitutional rights, the burden of a new trial must be borne by the prosecution, the courts, and the witnesses; the Constitution permits nothing less.** But in the administration of criminal justice, courts may not ignore the concerns of victims. Apart from all other factors, such a course would hardly encourage victims to report violations to the proper authorities; this is especially so when the crime is one calling for public testimony about a humiliating and degrading experience such as was involved here. Precisely what weight should be given to the ordeal of reliving such an experience for the third time need not be decided now; but that factor is not to be ignored by the courts. The spectacle of repeated trials to establish the truth about a single criminal episode inevitably places burdens on the system in terms of witnesses, records, and fading memories, to say nothing of misusing judicial resources.

Id., pp. 14-15.

Again, as with *Mechanik*, the entire quote offered in the

context of what was at issue, undercuts the Petitioner's contention herein. One wonders whether the author of the Petition herein assumed that no one would read the entirety of the cases cited therein.

In *United States v. Hastings,* the question was whether a reversal was an appropriate response to a prosecutorial error, in the absence of a finding that the error was prejudicial, and in light of what was deemed to be uncontested and overwhelming evidence of the defendant's guilt. Obviously, these factors are not present here, and, therefore, the *Hastings* case adds nothing to the issue at hand, other than to reiterate that when no prejudice is alleged to have occurred due to a legal error at trial, appellate courts should be mindful of the practical consequences of a reversal.

CONCLUSION

The instant Petition should be denied. It raises an issue which was not raised or ruled upon below. Its factual premise—that the trial judge granted the Respondent's motion for a new trial because of an alleged gender bias against the complainant—has not been contended for or proven at any fact-finding exercise below. Instead, the record adequately supports a finding that the reasons for granting Respondent's motion for a new trial were well within the trial court's discretion, and were found to be so by a panel the Michigan Court of Appeals which was never asked to consider the constitutional issue posed herein.

Respectfully submitted,

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Dated: May 26, 1995

APPENDIX A — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS DATED NOVEMBER 25, 1991

STATE OF MICHIGAN

IN THE CIRCUIT COURT
FOR THE COUNTY OF LIVINGSTON

File No. 91-6537-FC

PEOPLE OF THE STATE OF MICHIGAN,

vs.

TIMOTHY LEE HENSICK,

Defendant.

MOTION & SENTENCING

November 25, 1991
Courthouse
Howell, Michigan

Before - HON. G. MICHAEL HOCKING,
Circuit Judge Presiding

Appearances — PAMELA MAAS, ESQ.,
Acting Prosecuting Attorney

KENNETH MCINTYRE, ESQ.,
Attorney for Defendant

Appendix A

Transcribed by - THE CURTISS COMPANIES
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Dan O. Curtiss, Transcriber

[2] (Session of November 25, 1991 — 12:45 p.m.)

THE COURT: All right. We're here on the case of the People versus Timothy Lee Hensick, file 91-65-37-FC. Mr. Hensick is present before the Court with his attorney, Mr. McIntyre. Pamela Maas, Special Prosecutor, is here, representing the People.

Today is the date and time set for several matters. And I'll take them in logical procedural order. The first matter before the Court is a motion for a directed verdict of acquittal, which was filed and addressed subsequent to the verdict of the jury in this case, and I, at that time, wanted to provide Counsel with the opportunity to address the legal and factual issues combined in the form of a brief. I believe we have done that.

[Arguments and Allocation of Counsel Omitted]

[32] THE COURT: All right, Mr. Hensick, is there anything you would like to say on your own behalf before —

DEFENDANT: No, your Honor.

THE COURT: — the Court imposes sentence? All right, sir. Thank you. In fashioning the sentence, to a certain extent, I'm required to give the jury's verdict the benefit of any doubt that I have for purposes of this sentencing proceeding. The first area that I'm required to cover, as I understand the law of sentencing in

this State, is the presentence report itself. I want to make the record clear that this was a jury trial. I was the presiding judge. I heard the evidence. I have a good memory. And I have reviewed the presentence report as it pertains to the investigator's version of the offense, and I do note, in that investigator's version, that there were some errors, some statements that were not complete. I'm not considering the investigator's version of the offense in that report, because I heard the trial.

I want to comment on the sentencing information report contained and attached as part of the presentence [33] investigative report that we commonly call the SIR, or S I R, which contains the figuring of the sentencing guidelines. Despite the fact that neither Counsel has a quarrel with the figuring of the guidelines, I am required by the Supreme Court, in the case of the People versus Milbourn, which I am quite familiar with because I was the Prosecutor that prosecuted Kevin Milbourn and argued the case before the Supreme Court and received the new sentencing law in this State, and the Court requires me to comment, when appropriate, on the sentencing information report and requires me to deviate whether I'm asked to by Counsel or not.

In this regard, I want to talk first about Offense Variable Number Seven, which is the one that pertains to victim vulnerability and assesses five points. I don't find any evidence in this case that the victim vulnerability, as defined in Offense Variable Seven, was what was used to accomplish sexual penetration. If the jury believed the theory of the Prosecution, which they obviously did, by virtue of their verdict, it was not vulnerability, it was the use of force. I'm scoring Offense Variable Seven, for that reason, at zero. And let whatever reviewing court that did not sit and hear this case and hear the

record and hear the witnesses review what I have done in that regard.

The second area — or the second offense variable [34] which I'm going to discuss is Offense Variable 12, which is scored at 50 points. This brings into another issue with regard to People versus Milbourn, that has not been addressed here, that I have to address and will. If you look at Offense Variable 12 and you look at Prior Record Variable Seven, you will find that each score — assess a score for the very the same conduct, i.e., three separate penetrations. One is in the form of convictions occurring concurrent with the principal conviction; that is, PRV Seven. Offense Variable 12 concerns the number of penetrations. The Milbourn case makes it very clear that it is improper for a Court to consider the guidelines factors twice in fashioning a proportionate sentence.

I call this double-dipping. I'm not going to countenance it. And if this is the case that does, so be it.

The second reason that Offense Variable 12 troubles me in connection with PRV Seven: PRV Seven is scored at a 20. The Milbourn case makes it very clear that in fashioning a proportionate sentence that the Court is to take into consideration the prior criminal record of the Defendant; PRV Seven does not do that. Under the guise of prior criminal record, PRV Seven scores 20 points for a concurrent criminal act, to-wit: Counts II and III or Counts I and III or Counts I and II, whichever crime I'm [35] focusing on. And, in this case, I need only focus for purposes of fashioning a proportionate sentence on one of the counts. They are all equally weighted in seriousness.

The Milbourn case and all of the Supreme Court cases

dealing with the propriety of the charging function with relating — with relation to habitual offenders, as an analogy, say very clearly that, in assessing a person for his prior acts, it is important to consider society's attempts to change the person's behavior and whether or not those attempts failed or were successful. PRV Seven does not do that. It does not do that under the auspices of People versus Milbourn. People versus Milbourn is the authority I am to follow, not the Michigan Sentencing Guidelines.

With regard to PRV Seven, I'm ruling at this time, and I'm — I have a lot more to say. I'm not scoring PRV Seven at a 20, because it would violate the principle set forth in People versus Milbourn. PRV Seven is nothing more than a rehashing and a re-scoring of what's already scored in Offense Variable 12. For those two reasons I'm not scoring PRV Seven at 20; I'm scoring it a zero, because that's what People versus Milbourn requires me to do.

People versus Milbourn also says that the first place to look in fashioning a proportionate sentence is at the Michigan Sentencing Guidelines. It later says in the [36] case that the Guidelines, themselves, may be dis- — disproportionate. OV 12, for no penetrations in a criminal sexual conduct case, score zero. For one penetration, other than the score for which the Defendant was being convicted or was convicted, they score 25. And for two, they score —two or more penetrations, it's scored at 50. There is absolutely no consideration as to the facts and circumstances beyond what is in the Offense Variables in the criminal sexual conduct section — there is no allowance for variation based upon the circumstances involving that penetration.

It's arbitrary. It's capricious, and I'm going to fashion a

sentence that is proportionate — not what some book tells me to, based upon one penetration or two. As long as OV 12 provides no consideration between a less-serious penetration situation and a very-serious penetration situation, then the facts dictate to me, under the auspices of Milbourn, that those — that factor of scoring 50 is not only disproportionate, it's arbitrary. Now, there's nothing in between, and I'm not — I'm talking now. You have your right to appeal.

MS. MAAS: Your Honor, if I can just indicate: the Guidelines were not contested by Mr. McIntyre, and I had case law which I could present —

THE COURT: I have —

[37] MR. MCINTYRE: — to the Court.

THE COURT: — already told you that the Milbourn — sit down. I'm talking, and I'm not done. And you're not going to interrupt me. If you don't like what I say, appeal.

MS. MAAS: Your Honor, I just feel that it is my duty to bring before the Court —

THE COURT: Fine.

MS. MAAS: — additional case law —

THE COURT: Bring it.

MR. MCINTYRE: — on the specific issue that —

THE COURT: You bring it.

MS. MAAS: —this Court raised before and —

THE COURT: You bring it.

MS. MAAS: —I've been denied my opportunity before this Court to raise it.

THE COURT: Overruled. Sit down. The Milbourn case makes it very clear that whether you say anything or whether he says anything, it's my job to fashion a sentence that is proportionate, and it's my job to talk and to make comments, suggestions, about the Michigan Sentencing Guidelines, and I'm going to do that, whether you like it or not.

I don't know what the appropriate scoring is for Offense Variable 12. I don't know that it makes any [38] difference, because I'm going outside of the Guidelines.

And I will add, for your benefit, that regardless of whether either Counsel raise any issue before this Court, if I feel that the sentencing practices that I'm going to be charged with require certain factors be taken into consideration to make sure that I do my sworn duty to see that justice is done, I will do it, until someone tells me I'm not to.

I've received many letters asking me to put Mr. Hensick on probation. I'm not authorized to put Mr. Hensick on probation by Michigan law. I have a question in my mind as to whether I'm authorized to impose a fraction of a term of years in a county jail. It's not my intention to do that. That is not an issue I'm concerned with, but I wanted to make it clear that it is not my authority to sentence the Defendant to a term of probation.

Appendix A

In fashioning a proportionate sentence, I've considered the following factors, through the main sentencing goals addressed by the law in this state: Number one is the protection of society. I'm clearly convinced by the evidence in this case, as well as the many letters received from supporters of the Defendant, that he is not in any sense a threat to society that requires use of a lengthy prison term to protect the society, despite the fact that some would like him to be punished, because he holds a [39] license — or at one time held a license to practice law.

I feel that the widespread publication of his name and community status, as a result of the arrest, trial and conviction in this case, to a certain degree, provides an added measure of protection for society that Joe Blow doesn't receive, because Joe Blow doesn't have his picture on the front page. So everyone out there doesn't know who he is. In this case, that is a fact I am considering, because it has the value of protecting society to a certain degree.

I've considered deterring this Defendant and others. And I'm allowed to consider what factors I've taken into consideration in finding whether or not my sentence has a deterrent value. I first have to consider the total destruction of the Defendant, his family, his social and professional life, unlike Joe Blow. He suffered from that. I don't say — state that in terms of sympathy. I state that because, as a fact, it has deterrent value. These things will certainly deter him from nearly all forms of social interaction with women for some time to come.

The fact that this could happen to a person of high social and professional status will reaffirm the principle of equal justice under law for those of lesser means and deter them, also. The deterrent value which this conviction and sentence will afford is

also in direct [40] relation to the principle that "The bigger they are, the harder they fall." So there's a price to be paid beyond what it's — what's stated in the penal code.

The factors which caused this case to be a cause celebre in this community are the very factors which will deter others similarly or less similarly situated. The point is this. When it becomes a cause celebre, there's an extra price to be paid when the person is convicted that would not otherwise be paid by someone of less public stature.

Although the Defendant might have been convicted because of who he was, he certainly, in many ways, will be deterred, as well as others, because of who he was. I can assure the Defendant that he will not be punished because of who he was or who he is.

I've considered rehabilitating the Defendant. And it's a fact that sex offenders rarely have a chance in this system for rehabilitation. I see no evidence in this case that the acts from — which form the basis of this conviction were part of a pattern or were the culmination of a series of antisocial or sociopathic thoughts or acts, and it's abundantly clear to me that the Defendant's experience in this case was ultimately rehabilitative.

I've considered punishing the Defendant. The punitive response which society imposes against those who [41] break its rules of conduct is the price one pays for violating the law. The criminal justice system in this situation authorizes only that punishment which is in the form of a term of imprisonment in a state institution, as I currently understand the law. This is not to say, however, that the Court may not consider the other forms of punishment which have been visited upon the Defendant in order to insure that society's overall response is one that is

proportionate to the Defendant's crime and his background. The Milbourn case requires me to consider the Defendant's background, whether anyone in this room likes it or not.

I'm also required by the Milbourn case to fashion a proportionate sentence that takes into consideration the factors I have just outlined. The Milbourn case is very clear. In fashioning the sentence in this case, it is my duty to determine where, on a continuum of seriousness, the Defendant's conduct lies in connection, also, with his past criminal record. And finding that continuum in a capital case is ultimately more difficult, because there is no maximum sentence, and the Milbourn case recognizes that fact that a capital case — in a capital case, it's much more difficult to determine where on a continuum certain conduct should be placed. But they also make it very clear that the high end of the continuum is reserved for the most heinous [42] offenses and offenders.

In determining where the Defendant fits on this continuum, this Court's task has been somewhat reduced in scope, as it is an uncontested fact that the Defendant has no prior criminal record. This Court has previously addressed the inherent conflict between the factors offered in the initial scoring of PRV Seven and the reasons for which our Supreme Court has authorized enhanced punishment only for an individual's failure to conform after society's previous attempts.

The thrust then of this Court's proportionality analysis concerns the circumstances surrounding this offense, as well as any aggravating or mitigating circumstances present. And the starting point, as I've stated, for this analysis is the Michigan Sentencing Guidelines. And those Guidelines, depending upon which version one chooses to accept — at the low end, could

conceivably put the Defendant at a grid A3, which is 60 to 120 months minimum. In this case, the presentence officer figured the Guidelines, in his opinion, at 120 to 300 months.

Because the Defendant has no prior criminal record, and for the reasons stated hereafter, the Court believes that a proportionate sentence for this case is the one that falls outside and below the Guideline ranges [43] mentioned above. To put it in plain English, I'm going outside the Guidelines. I'm deviating from the Guidelines, and I'm making a downward deviation. And I'll mention once more, Offense Variable 12 for criminal sexual conduct first degree provides arbitrarily for a score of either 25 or 50. That's it, without regard to whether such penetrations occurred during one continuous sexual episode, as here, or during separate and distinct episodes, resulting in one penetration, a situation which would be much more aggravating. They score them both the same. I've considered that.

The second consideration that I've considered in placing these acts on the continuum: No force used in terms of a category of striking, no force used in the form of threats to strike or use of a weapon, no verbal threats of any kind. There is no indication the victim thought that the Defendant had a weapon. There's testimony that he was polite and never even raised his voice.

Third — evidence at the trial. There was evidence at the trial that the victim was not sure that the Defendant knew how she felt about his advances. This is a mitigating factor in that it reduces the Defendant's culpability as far as his state of mind is concerned. There is no requirement of specific intent, but I'm certainly required to determine whether or not these acts were [44] committed with an evil state of mind.

Number four — the fact that the victim agreed to the Defendant's 2:00 a.m., Sunday morning visit is a mitigating circumstance, again with regard to the presence of an evil state of mind on behalf of the Defendant. This is not a perfect world, but as common sense tells me that when a man calls a woman at 2:00 a.m. and says he wants to come over and talk and he's — that's accepted, a reasonable person, whether you want to shake your head or not, Ms. Maas, I haven't been living in a shell. A reasonable person understands that that means certain things. They may be wrong.

The next factor I've considered: The victim and the Defendant, in this case, were very familiar with each other, as opposed to an attack by a total stranger. The Guidelines don't give any consideration for that distinction. This is a mitigating factor, and the Milbourn court says it is. This is a mitigating factor as the Guidelines give it no consideration at all. And that's also a reason to go outside of the Guidelines.

Number six reason in determining the proportionate sentence, as well as going outside of the Guidelines, as all previous five are, here for both purposes: One factor I have to consider is that this was the weakest criminal case that resulted in a conviction that I've ever seen, and I've [45] been an attorney for 15 years, 14 of which I was a Prosecuting Attorney. The Guidelines don't consider that.

Item seven: The rule for proportionality authorizes me, also, to consider the circumstances surrounding this Defendant, and, in that sense, it is totally appropriate to consider who he is and who he was. He engaged himself in government service, in public service, which is the bright side or opposite side of the coin, which has on its opposite face, a criminal record. If I am to

concern myself with a criminal record, I am to concern myself with the lack thereof. The branding of the Defendant as a sex offender because of the media exposure caused by his public prominence is a price he has paid over and above one convicted of criminal sexual conduct in the first degree. I've considered that. In this sense, he has and will experience society's punishment beyond what is embodied in the Guideline's grid structure. Another price paid is the loss of his license to practice his profession. In that sense, he's paying a price paid only by those infinitesimally few people that are situated similar to the Defendant.

In this regard, I do not find any credible evidence that the victim consented to the Defendant's visit for professional reasons. The jury could believe whatever they want. That was not based on an essential element of [46] this offense. To me it defies reason and logic. And I'm the one that has to consider the Guidelines, not the jury. There was not a fact found by the jury. I am finding it for purposes of this sentence.

Item eight: Supreme Court has held that the important factors at sentencing are protection of society, deterrence, rehabilitation and punishment. The Milbourn court states, at page 657, as follows: "Departures are appropriate where the Guidelines do not adequately account for important factors legitimately considered at sentencing." I've given an analysis of those four factors which are widely recognized in the State of Michigan and the importance that's placed on those factors in fashioning a proportionate sentence.

Item nine — and I've considered this: The element of personal injury, as resulting from this occurrence, is tenuous, less clear cut and intertwined with preoffense-date trauma for which this Defendant was not a cause.

Appendix A

Item ten: There is no evidence that the force used was anything other than the absolute minimum required to cross the threshold of force, which turned this into a crime, if you believe the findings of the jury. And I'm forced to do that for this proceeding.

Number 11: A mitigating factor, although minor, [47] is evidence that the Defendant helped the victim up off the floor after the occurrence. Another mitigating factor —that the victim told a spouse-abuse agency the sex was not forced but resistance — her resistance was worn down by the Defendant's persistent request. I heard that sworn testimony, and I've considered it at sentencing.

My conclusion, based upon the above reasons, is that the Court finds this offense is very close to the least serious end of what can constitute a CSC first degree. It's at the near bottom of the continuum, whether he's an attorney or not. Secondly, this Court finds that the Defendant's history and background, when coupled with the circumstances of the offense, make him a minimal threat to society; therefore, the Court has come to a conclusion as to what it feels is a proportionate sentence.

It's the sentence of the Court, Mr. Hensick, that you be committed to the Michigan Department of Corrections for a period of not less than 18 months nor more than 120 months, with credit for one day. Secondly, the order of the Court, Department of Corrections complete and file properly the form called A Special Problem Offender Notice. And the category in which the Defendant shall be placed is a Protection Case. If it comes to my attention that that — that has not been done, then I will bring the Department of Corrections before the Court to find out why they haven't [48] complied with the Court's directive.

Appendix A

Mr. Hensick, you are entitled to appellate review of your conviction and sentence. If you're financially unable to provide an attorney to perfect an appeal, the Court will appoint an attorney and furnish the attorney with portions of the transcript and record that the attorney requires to prepare a postconviction motion and to perfect an appeal. Your request for the assistance of an attorney must be made in writing and sent directly to the Court within 42 days.

Mr. McIntyre, would you be kind enough —

MS. MAAS: Your Honor, may I ask two questions?

THE COURT: Yes.

MS. MAAS: First question, is the 18-month to 120-month sentence for each of the three counts of which the Defendant was convicted.

THE COURT: Thank you. That is a sentence for each of the counts I, II and III, and they will run concurrent.

MS. MAAS: And — and, for purposes of the SIR, did the Court end up scoring him as an A3?

THE COURT: Well, I don't really know, because I went beyond either sentencing Guideline grid. I went below them. If I leave the — an A3 would be — how many points are you assuming I gave him —

[49] MS. MAAS —

THE COURT: — for OV 12.

MS. MAAS: I just — your Honor, I — I don't know, because I — I was not sure. And I just think for purposes of the — I — I believe that we need to have the determination as to what the Guidelines are —

THE COURT: All right.

MS. MAAS: — for purposes of —

THE COURT: Well, for purposes of the record, I'll leave OV 12 scored at a 50, and I'm deviating because I don't believe OV — I think there are reasons that OV 50 are arbitrary and don't encompass a proportionate analysis of those factors. I'm leaving OV 13 at a five. I'm striking OV Seven, making it a zero, so the offense score is 55; it's still in offense-severity level four, so it would be an A4.

MS. MAAS: A4? Thank you, your Honor. Further —one additional thing is I believe that the statute requires that the Defendant submit to an HIV test. We would ask that that be part of the Court sentence.

THE COURT: Defendant shall submit himself to the proper medical authorities as part of this sentence for HIV testing.

Mr. McIntyre, have you completed the appeal rights? I just need the original back for the file. Thank you. All right. The record should reflect that the Court's [50] received and is filing the Defendant's receipt of his —written receipt of his appeal rights, dated today's date, signed by the Defendant.

Now, the next issue that was noticed on for today and I received also this morning, a application and petition for appeal bond. Mr. McIntyre?

MR. MCINTYRE: Yes, your Honor. I apologize. I thought those had been delivered to you last week. I sent a live person over there with directions to find you and make sure you got them. That's my fault. I — your Honor, at this time, I would respectfully request that the Court consider granting Mr. Hensick's request in place — I'm sorry — to be released on bond, pending the taking of an appeal and/or filing a motion for a new trial. I think I have indicated previously on several occasions an intention to do that if the Court denied his motion for a directed verdict.

I have prepared a claim of appeal. I've handed a copy of that to Miss Maas this morning, together with all of the necessary documents to perfect the appeal, other than the judgment of the Court, because, obviously, I didn't know what the judgment of the Court would be, and no document setting forth what that judgment was is available. I began, your Honor, pursuant to a memo, to stop by the Court of Appeals on the way down here this morning and asked whether [51] or not I could file a claim of appeal without that document, and I was told that I could not — that I had to have the order or judgment appealed from attached to my claim of appeal before they would even accept it.

As I understand the law, there is an ambiguity —at least, a question, as to whether or not a request for bond, pending appeal, can be directed to the trial Court prior to the time that the actual physical act of filing the appeal is undertaken. As I read the most recent Michigan Court Rule, it can and I believe I've cited that — it's Rule 7. — I think it's 208, which says that "trial courts retain issues of sureties or bonds until and unless the Court of Appeals orders otherwise." And then, obviously, that's the case here. The Court of Appeals hasn't entered an order otherwise, because they have — their clerk refused to accept my claim of appeal.

And, your Honor, if that, in fact, is the case —if under that Court Rule this Court can consider the question of whether or not bond, pending the filing of a motion or the outcome of a motion for a new trial, or the outcome of an appeal, is known, then, as I read the statute — I believe it's 7.709(a) part 2, a and b — it directs the trial — that the trial Court can consider bond, pending an appeal, even in an assaultive case — proposition B case, such as this — and can grant bond, pending appeal, if two [52] factors are addressed and found by the Court to be present.

Those factors, as I recall the statute, are that the Defendant poses no threat to society or others. And, secondly, that the issues posed by the perspective or the appeal or the request for a new trial are substantial either legally or factually.

Your Honor, I would submit that those two criteria, if the Court gets to the point where it believes that it is appropriate for this Court at this point to consider them, are easily met in this case. I believe the Court has certainly suggested with its ruling that it finds that Mr. Hensick is not a threat to society, and there clearly are a number of legal issues and factual issues that would merit finding that this is not simply a stall tactic. This is not frivolous. And that, as I understand Giacalone and the cases that go to that issue, even as far back as 1888 that I've cited, certainly is true here.

The basic question that I see before your Honor is whether or not it has authority to act until I file the actual claim of appeal. As I cited in my memo, when there is a conflict between a Court Rule and a statute, the Court Rules win. And the Court Rule in this case is that the trial Judge retains jurisdiction on matters of bond until the Court of Appeals rules otherwise.

Therefore, I am respectfully asking that this [53] Court make a finding now on the two issues posed by the statute. And that if this Court feels that before bond can officially be granted, that the appeal has to be filed, I will, when I get a copy of the judgment, drive it to Lansing, file it and ask that this Court's finding, what I'm proposing that it make now, spring to life and let Mr. Hensick be free to pursue his motion for a new trial or post judgment remedies without having to spend time in jail.

I think I neglected and I think, perhaps, Ms. Maas forgot about it, but, as I recall, there was some requirement or request that he show up for fingerprinting or something that was raised shortly after this event occurred and I think the Court suggested that that could be done at the time of sentencing. What I'm proposing, if this Court will not officially hear the — the request for bond until I file the appeal, that that be done while I'm physically driving the order to the Court of Appeals, make the filing and then have the Court's ruling, whichever it is, spring into effect. Thank you, your Honor.

THE COURT: Thank you, Mr. McIntyre.

Ms. Maas?

MS. MAAS: Very briefly, your Honor. It's the People's position that the Defendant should not be entitled to bail, pending appeal, under Michigan Compiled Law 77.8. It indicates that the trial Judge may admit the Defendant to [54] bail if the offense charged is bailable and if the offense is not an assaultive crime as defined in Section 9a of this Chapter. It's the People's position that since this Defend- — or since this is an assaultive crime, the trial Court does not have the authority to grant the appeal bond.

Furthermore, with regard under the statute section, which Counsel has already seven (sic), which is 770.9(a), the Court must make two findings if, in fact, it is going to find that it has the ability to do so under the Court Rule. One, that the Defendant is not likely to pose a danger to other persons. The Court has previously stated his position. The People's position is divergently different from that of the Court, indicating that the Defendant does pose a danger to other persons.

And, furthermore, without knowing what the appeal or the application is or without seeing any of the issues, I don't think that the Court can rule on whether they raise a substantial question of law or fact. We would respectfully request that this Court deny the motion.

THE COURT: Well, 770.9(a)(2) is the statute which controls conditions or the findings that are required to be made before an appeal bond is allowed. The Court Rule states — MCR 7.208(f), the trial Court retains jurisdiction as to bond matters. It seems to me that to hear this issue tomorrow morning because the Court of Appeals is in Lansing [55] and the Defense attorney has to file a document with them, may — that makes no sense. I'm ruling that I have authority under Michigan Court Rule 7.208(f), in conjunction with 770.9(a)(2), to grant appeal bond if I find that this Defendant is not likely to pose a danger to others and that the appeal application raises a substantial question of law or fact.

I have already ruled that the Defendant does not pose a danger to others. If there is any issue on appeal that is substantial, perhaps it would be the fact that under Michigan law the Court can grant a new trial when it feels that there has been a miscarriage of justice. For this —purposes of this hearing, an appeal bond — I make that finding, in addition to the following.

Appendix A

There are some substantial issues on — in this case, and some of them are as follows: One involves the late disclosure of witness Tanya Wrinn's letter to the Michigan State Police.

Another issue involves the identification of this Defendant as the perpetrator of this offense by witness Theresa Mackey during the recitation of the history, which was necessary for her to make a diagnosis, which Michigan law specifically prohibits part of that history to include the identification of the perpetrator.

There is a question in this Court's mind as to the proofs in this case and whether they — whether they [56] established the requisite personal injury for each and every separate incident.

There is a question in this Court's mind as to whether the Prosecutor's final argument appealed to a popular prejudice against this Defendant because of his status as an attorney and who he is.

There is also a substantial question of law in this Court's mind as to the Prosecutor's appeal to the popular prejudice against Defense witness Mark Lyon because of his status as an attorney, especially in view of the fact that this Court does not him as otherwise impeached.

This Court finds another substantial issue. The timely failure of the Prosecution to disclose exculpatory information, contained in the reports of Joyce Ewing and Theresa Mackey. And when that was brought to this Court's attention the Court denied a motion for an adjournment of the trial or a continuance, and I now have second thoughts about that denial.

Another issue, which is the crux of my granting an appeal

bond, is the severity of the weakness of the Prosecution's case; that is, if this Court sat without a jury and did its duty, it was clear that the Prosecution failed to prove the case beyond a reasonable doubt. I would have acquitted this Defendant. That raises the issue in connection with the other issues that I've listed. I [57] believe there's a substantial issue of law as to whether a jury's verdict in this case was a miscarriage of justice. And, if that's not a substantial issue for appeal, I don't know what is.

Motion for appeal bond is granted. And the trial bond at this time is continued, and I believe it's $50,000, personal recognizance.

MR. MCINTYRE: Yes, that's right.

THE COURT: That's conditioned on the fact that on or before 5:00 o'clock p.m., Mr. McIntyre, you will have your claim of appeal filed, and supply a true copy to the Court.

I will, if I heard you properly, Mr. McIntyre, direct that your client proceed to the Sheriff's Department to have his fingerprints taken, so we can do away with that issue.

* * *

APPENDIX B — EXCERPTS OF FORMAL COMPLAINT NO. 48

BEFORE THE MICHIGAN JUDICIAL TENURE COMMISSION

FORMAL COMPLAINT NO. 48

IN THE MATTER OF:

HON. G. MICHAEL HOCKING
Judge, 56th Circuit Court
Charlotte, Michigan

COMPLAINT

The Judicial Tenure Commission of the State of Michigan ("Commission") files this Complaint against G. Michael Hocking ("Respondent"), 56th Circuit Judge in the City of Charlotte, Eaton County, Michigan. The Commission charges misconduct constituting a violation of the requirements for standards of judicial conduct under MCR 9.205 of the Michigan Court Rules of 1985. This action is taken pursuant to the authority of the Commission under Article VI, § 30 of the Michigan Constitution of 1963, as amended, and Rule 9.200 et seq. of the Michigan Court Rules of 1985. The filing of this Complaint has been authorized and directed by resolution of the Commission. The acts of judicial misconduct in office are set forth in the following paragraphs:

(Unrelated Claims Omitted)

(9) That in August of 1991, Respondent presided over the case of *People v. Timothy Hensick,* (Case 91-6537-FC) in the Livingston County Circuit Court, sitting by assignment of the

State Court Administrative Office. The defendant was charged with three counts of First Degree Sexual Conduct.

(10) That on September 4, 1991, a jury found the defendant guilty of three counts of First Degree Criminal Sexual Conduct.

(11) That on November 25, 1991, Respondent sentenced the defendant for those crimes, deviating substantially, in a downward direction, from the sentencing guidelines. In justifying the downward departure Respondent made the following statements:

> a) "The fact that the victim agreed to the Defendant's 2:00 a.m., Sunday morning visit is a mitigating circumstance, again with regard to the presence of an evil state of mind on behalf of the Defendant. This is not a perfect world, but as common sense tells me that when a man calls a woman at 2:00 a.m. and says he wants to come over and talk and he's — that's accepted, a reasonable person whether you want to shake your head or not, Ms. Maas, I haven't been living in a shell. A reasonable person understands that that means certain things. They may be wrong."
>
> b) "[I]t is totally appropriate to consider who he is and who he was. He engaged himself in government service, in public service, which is the bright side or opposite side of the coin, which has on its opposite face a criminal record. If I am to concern myself with a criminal record, I am to concern myself with the lack thereof. The branding of the Defendant as a sex offender because of the media exposure caused by his public prominence is a price he has paid over and above

one conviction of criminal sexual conduct, in the first degree, I've considered that. In this sense, he has and will experience society's punishment beyond what is embodied in the Guideline's grid structure. Another price paid is the loss of his license to practice his profession . . ."

c) "A mitigating factor, although minor, is evidence that the defendant helped the victim off the floor after the occurrence, another mitigating factor — that the victim told a spouse-abuse agency the sex was not forced but resistance — her resistance was worn down by the Defendant's persistent request. I heard that sworn testimony, and I've considered it at sentencing."

d) "It's arbitrary. It's carpicious, and I'm going to fashion a sentence that is proportionate — not what some book tells me to, based upon one penetration or two . . ." (referring to the sentence called for under the sentencing guidelines)

(12) That during the sentencing of Mr. Hensick, Respondent was rude, discourteous and hostile towards Assistant Prosecuting Attorney, Pamela Maas.

(13) Respondent's actions, as described in paragraphs 9 through 12 constitute:

(a) A failure to be patient, dignified and courteous to lawyers and others with whom a judge deals in his official capacity, in violation of the Code of Judicial Conduct, Canon 3A(3);

(b) A failure to avoid addressing counsel in a controversial manner or tone, in violation of the Code of Judicial Conduct, Canon 3A(8);

(c) Failure to respect and observe the law in a manner that promotes public confidence in the integrity and impartiality of the judiciary, contrary to the Code of Judicial Conduct, Canon 2B;

(d) Conduct that is clearly prejudicial to the administration of justice by creating the appearance of gender bias by virtue of comments made during sentencing which suggested that the victim invited the sexual assault when she allowed the defendant, her divorce attorney, to come over in the early hours of the morning after he told her he needed to speak with her.

(e) Conduct which fails to treat a person fairly, with courtesy and respect due to their gender, in violation of MCR 9.205(C)(7).

* * *

APPENDIX C — EXCERPTS OF MASTER'S FINDINGS OF FACT, CONCLUSIONS DATED DECEMBER 28, 1994

STATE OF MICHIGAN

BEFORE THE JUDICIAL TENURE COMMISSION

Formal Complaint No. 48

IN THE MATTER OF:

HON. G. MICHAEL HOCKING
EATON COUNTY CIRCUIT COURT
CHARLOTTE, MICHIGAN

MASTER'S FINDINGS OF FACT
CONCLUSIONS

This is the Matter of the Honorable G. Michael Hocking, Judge of the 56th Circuit Court, Charlotte, Michigan. Formal Complaint No. 48.

The Formal Complaint in this matter consisted of 22 paragraphs, divided into six categories.

(Unrelated Matters Omitted)

As to the *sentence reduction.* I would first quote the comment by the English Judge Lord Mansfield, who some three hundred years ago said, in his advice to judges: "Give your rulings, but not your reasons. Your rulings may be correct, your reasons will unquestionably be wrong."

When Judge Hocking gave his ruling he stated that he had no intention to accept the guidelines, which called for a sentence of

ten to 25 years; but, rather, would reduce the sentence. He gave several reasons, including the Defendant's exposure in the media caused by his public prominence and the loss of his license to practice law.

Then, unfortunately, he stated, "A mitigating factor, although minor, is evidence that the Defendant helped the victim off the floor after the occurrence. Another mitigating factor is the fact that the victim agreed to the Defendant's 2:00 a.m. Sunday morning visit." He further states . . .

"This is not a perfect world, but as common sense tells me, that when a man calls a woman at 2:00 a.m. and says that he wants to come over and talk and, that's accepted, a reasonable person, whether you want to shake your head or not, Miss Mass, I haven't been living in a shell, a reasonable person understands that means certain things, they may be wrong."

In this day of our years those statements were most unfortunate, even bizarre. And, as a result, particularly the comment regarding, "Helping the victim off the floor," led to ridicule across the country when newspapers picked that one sentence up and made much of it. It showed a certain obvious lack of sensitivity towards the feeling of women generally and could not help but to arouse the wrath of many people, not only here in Michigan, but everywhere.

Obviously, sometimes the less said the better; and what is not said never gets written down.

But Judge Hocking is caught out of his own mouth on this charge; and, certainly, statements of that nature hold the Court up to ridicule in violation of the standards of judicial conduct.

Appendix C

Judge Hocking had every right to reduce the sentence if that was his feeling, and this is not to suggest that this Hearing in any way could be critical of that action, but the unfortunate comments are to be greatly regretted.

In this regard I can only say that Judge Hocking kept the nest that hatched the egg of this Complaint himself.

Item 3. During the sentencing of Defendent Hensick Miss Maas came to her feet, which caused the Respondent to admit that this made him angry and that he perceived it as interruption of his statement.

Miss Maas, however, did not say anything until Judge Hocking addressed her. He then ordered her to sit down when she attempted to bring him a case she was trying to offer, in which he had said, "Bring it," but then he repeatedly ordered her to sit down.

The following occurred:

"MS. MAAS: Your Honor, if I can just indicate: The guidelines were not contested by Mr. McIntyre and I have case law which I could present —

THE COURT: I have —

MS. MAAS: — to the Court.

THE COURT: — already told you that the Milbourn — sit down, I'm talking, and I'm not done, and you're not going to interrupt me.

If you don't like what I say, appeal."

Further on Miss Maas said: "I have been denied my opportunity before this Court to raise it.

THE COURT: Overruled. Sit down.

The Milbourn case makes it very clear that whether he says anything, it's my job to fashion a sentence that is proportionate, and it is my job to talk and make comments, suggestions, about the Michigan sentencing guidelines, and I'm going to do that, whether you like it or not." All this is a loud angry voice.

Socrates, that wise man, once said: "The principle duty of a judge is to listen courteously." Unfortunately, in this instance, as well as in another, courtesy was lost and rudeness took over.

* * *

The examiner would contend that by the comments at the *Hensick* sentencing, and by the comments to attorneys Maas and Sharp, as well as his conduct toward Miss Grenawalt, that Judge Hocking displays a *gender bias.* But enter in witness Robin Nottingham.

Miss Nottingham, an attorney who became aware of this allegation of gender bias, and thought it so unfair that she volunteered her own affidavit and testimony to argue that Judge Hocking had, at all times that she had observed, displayed a fair and proper attitude towards all who appeared before him, both men and women, and showed no gender bias.

She sent a notice of these charges to several other women

attorneys, suggesting that they, too, file affidavits or offer to testify. Many of them did so. Repeatedly they said, in instance after instance in their appearances before Judge Hocking he had displayed no indication of gender bias.

The Examiner would contend that this evidence is immaterial. I do not find it so.

It appears to me that the testimony of many women attorneys, with their experiences with Judge Hocking, has a probative value. And while I agree that his bizarre comments in the *Hensick* case, and his unfortunate loss of his control when interrupted by Miss Sharp, shows a remarkable lack of restraint when interrupted. He should recall the words of that paragon of patience, the Prophet Job, who said, "Please be silent, that would be your greatest wisdom." The Judge might be admonished to maintain his self control, but the evidence does not convict him of gender bias.

DATED: 12/28/94

s/ Joseph B. Sullivan
Joseph B. Sullivan
Master

APPENDIX D — DECISION AND RECOMMENDATION FOR ORDER OF DISCIPLINE, DATED APRIL 12, 1995

STATE OF MICHIGAN

BEFORE THE MICHIGAN JUDICIAL TENURE COMMISSION

FORMAL COMPLAINT NO. 48

IN THE MATTER OF:

HON. G. MICHAEL HOCKING
Judge, 56th Circuit Court
Charlotte, Michigan

DECISION AND RECOMMENDATION FOR ORDER OF DISCIPLINE

At a session of the Michigan Judicial Tenure Commission held on the 10th day of April 1995, at which the following Commissioners were present:

Henry Baskin, Esq., Chairperson
Hon. Marianne O. Battani
F. Philip Colista, Esq.
Hon. Theresa Doss
Mrs. Sibyl M. Ellis
Hon. Barry M. Grant
Hon. M. Richard Knoblock
Hon. William B. Murphy
Prof. Harry C. Veryser

On June 14, 1994, the Michigan Supreme Court appointed

Appendix D

Hon. Joseph B. Sullivan as Master to preside over the hearing of Formal Complaint No. 48, filed by the Judicial Tenure Commission ("Commission") against the Hon. G. Michael Hocking, 56th Circuit Court, Charlotte, Michigan. Following the hearing and oral and written closing argument submitted by the Respondent and the Examiner, the Master submitted his Report on December 28, 1994. Thereafter, both the Examiner and the Respondent filed written objections to portions of the Master's Report, with supporting briefs.

Oral argument on the objections to the Master's Report was held before the Commission on March 20, 1995. The full Commission, the Examiner, Respondent and Respondent's counsel were present. The Commission reviewed the hearing transcript and pertinent exhibits.

Upon careful consideration of the Master's 19-page report, independent evaluation of the record, and examination of the briefs filed by the Examiner and Respondent, the Commission adopts the Master's findings of fact and conclusions of law, except as otherwise noted, as the basis for its Decision and Recommendation for Order of Discipline in this matter.

(Unrelated matters omitted)

II

Misconduct During Hensick Sentencing

Paragraphs 7 through 10 of the Complaint alleged misconduct with respect to Respondent's handling of the sentencing hearing of *People v. Hensick*, 91-6537-FC. Specifically, the Complaint charged that the comments

Respondent made to justify his downward deviation from the sentencing guidelines were blatantly improper and sexist, and that he was impermissibly rude toward Pamela Maas, the prosecuting attorney, during the same hearing.

On September 4, 1991, a jury found the defendant, a local attorney, guilty of three counts of first degree criminal sexual conduct against a client. On November 25, 1991, Respondent sentenced the defendant, deviating substantially downward from the sentencing guidelines. The Master noted that Respondent had every right to reduce the sentence if that was his feeling (MR 5), and we do not question Respondent's decision to deviate from the guidelines.

We are, however, appalled by the insensitivity displayed by Respondent when he commented that because the victim (defendant's client), agreed to the defendant's 2:00 a.m. Sunday morning visit after he said he wanted to come over and talk, that she should have understood "that means certain things." (Exh. 1 - videotape) Implicit was the suggestion that because she had agreed to meet with her attorney at that hour that she had somehow "asked for it." Respondent found the hour of the agreed-to meeting to be a mitigating circumstance and added fuel to the fire of that insulting observation with another demeaning, offensive remark when he noted that an additional "mitigating factor, although minor, is evidence that the defendant helped the defendant up off the floor after the occurrence." (Exh. 1 - videotape)

The Master found that Respondent's statements were "bizarre" and "showed a certain obvious lack of sensitivity towards the feeling of women generally," (MR 5) and we agree. Even more, they strongly suggest impermissible gender bias by

implying the victim was somehow responsible for or invited the assault. We also adopt the Master's conclusion that "statements of that nature hold the court up to ridicule in violation of the standards of judicial conduct." (MR 5)

While Respondent was discussing the sentencing of the defendant and his problems with following the guidelines, prosecuting attorney Pamela Maas began to stand up. Before she said a word, Respondent angrily announced, "I'm talking now. You have your right to appeal." (Exh. 1 - videotape) Ms. Maas then appropriately attempted to explain that the sentence scoring had not been contested by the defendant's attorney and that she had pertinent case law. In an unjustified display of temper, Respondent angrily and unreasonably ordered Ms. Maas to sit down, challenged her repeatedly to bring the case law, and again harshly ordered her to sit down.

We agree with the Master that "unfortunately, in this instance, as well as in another, courtesy was lost and rudeness took over." (MR 7) A judge should treat every person fairly, with courtesy and respect, should be patient, dignified and courteous to lawyers, and should accord to every person legally interested in a proceeding, or the person's lawyer, full right to be heard. Code of Judicial Conduct ("CJC"), Canons 2B, 3A (3) and (4). Respondent did not object to the Master's findings with regard to his treatment of Ms. Maas. We find the misconduct alleged in this regard to have been established.

* * *

Appendix D

VI

Gender Bias

The Complaint alleged that in his dealings with Ms. Grenawalt, attorneys Maas and Sharp, and his comments at the *Hensick* sentencing hearing, Respondent displayed discourteous, disrespectful conduct which appeared, in each case, to be predicated in some way on the gender of the individuals involved. The Master found that Respondent's comments in the *Hensick* case and "his unfortunate loss of his control when interrupted by Ms. Sharp, shows a remarkable lack of restraint when interrupted" but concluded that the "evidence does not convict him of gender bias." (MR 19)

The Master based his conclusion on the fact that several female attorneys testified on behalf of Respondent that they had never witnessed any indication of gender bias in their appearances before him. The Master attributed considerable probative value to their testimony.

The Master erred in attaching significant probative value to the testimony of these witnesses. Evidence of good conduct on some occasions does not disprove Respondent's acts of abuse and misconduct in other cases. *In re Elliston,* 789 SW2d 469, 480 (Mo. Banc 1990). The testimony of persons who were not present during the alleged incidents of misconduct, and thus cannot assess the serious nature of those incidents, but nonetheless believe Respondent to be a fair and patient person of appropriate judicial temperament, is *not* probative. *Kloepfer v. Commission on Judicial Performance,* 782 P.2d 239, 263 (Cal. 1989)

Just as an attorney cannot defend a malpractice case solely

on the basis that he represented other clients in an acceptable manner, the absence of gender bias in some situations does not preclude it from happening in others. We find a strong indiction of a pattern of gender bias in Respondent's conduct, but since the complaint did not formally charge a pattern of gender bias, we make no findings in this regard.

* * *

Appendix D

* * *

DISSENT AS TO FINDINGS

We dissent from the Commission's finding that Respondent's remarks at the Hensick sentencing hearing constitutes misconduct. We certainly would not condone a view that a judge could appropriately conclude that a victim of criminal sexual conduct "asked for it" or "was responsible for or invited" a criminal act. However, in the context of this case, Respondent was clearly concerned that the evidence of force presented to the jury at trial was insufficient to support the conviction. (Subsequently, Respondent overturned the conviction on this basis and granted a new trial, which decision was upheld on appeal). Respondent's comments regarding agreement by the victim to a 2:00 a.m. visit and the helping off the floor comment although inartfully articulated and offensive especially when taken out of context, can be interpreted on this record as an expression not of the victim's conduct, but of Respondent's evaluation of the *defendant's* state of mind at the time of the offense; a proper consideration in determining sentence. These comments at sentencing should more appropriately be dealt with in the appellate review process of the sentence departure rather than by the Judicial Tenure Commission.

Although, as stated by the master "sometimes the less said the better; and what is not said never gets written down", to the end that a complete record is available for appellate review, trial judges are required by law to articulate the reasons supporting their sentencing decision, particularly, as here, when departing from the sentencing guidelines. To conclude, as the majority does, that comments made by a sentencing judge in explanation

of legitimate sentencing considerations constitutes misconduct is inappropriate and will have the effect of discouraging judges from fully articulating the factors considered in arriving at their sentencing decisions.

For these reasons we decline to so conclude.

JUDICIAL TENURE COMMISSION
STATE OF MICHIGAN

s/ Theresa Doss
Hon. Theresa Doss

s/ M. Richard Knoblock
Hon. M. Richard Knoblock

s/ Wm B. Murphy
Hon. William B. Murphy

Dated: Apr. 12, 1995

APPENDIX E — OPINION REGARDING DEFENDANT'S MOTION FOR NEW TRIAL FILED NOVEMBER 18, 1992

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF LIVINGSTON

Livingston Co. File: 91-6537-FC

HON. G. MICHAEL HOCKING

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs.

TIMOTHY L. HENSICK,

Defendant.

OPINION REGARDING DEFENDANT'S
MOTION FOR NEW TRIAL

Richard Thompson (P21410)
Oakland Co. Prosecutor
by Special Appointment
By: Pamela J. Maas (P40452)
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Appendix E

OPINION REGARDING DEFENDANT'S MOTION FOR NEW TRIAL

Introduction

Defendant was tried before a Livingston County jury and convicted on September 4, 1991, of three counts of Criminal Sexual Conduct-First Degree; M.C.L. 750.520b(1)(f). This Court sat as presiding judge pursuant to assignment by the State Court Administrator's Office. On November 25, 1991 defendant was sentenced to 3 concurrent terms of 1 1/2 to 10 years in prison. Defendant has been free on appeal bond since that time.

On or about February 12, 1992 defendant filed this Motion for New Trial. The hearing on this motion took place on June 3, 1992 after an April 14, 1992 remand order by the Michigan Court of Appeals.

Discussion

Defendant cites may procedural and substantive errors that allegedly occurred prior to and during the course of trial. Defendant also alleges that newly discovered evidence mandates a new trial as well.

I.

This section of this Court's Opinion will briefly address the issues submitted by defendant which do not merit the granting of a new trial. MCL 769.26.

(Discussion Omitted)

Appendix E

II.

An examination of the following issues convinces this Court that the trial and verdict of the jury was based on errors which in resulted in miscarriage of justice. MCL 769.16.

(A) The Testimony of Sharon Bloom and Theresa Mackey.

Sharon Bloom, a limited psychologist and "rape" counselor, and Theresa Mackey, a psychiatric nurse, both testified extensively at trial as to certain statements made to them by the victim Tina Ringe concerning the details of the alleged offense. The defendant objected to such testimony on the grounds of hearsay. The prosecutor responded to the objection by stating that the testimony offered would constitute a hearsay exception under MRE 803(4) which provides for the admission of:

> "statements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof in so far as reasonably necessary to such diagnosis and treatment."

The defendant responded that such testimony did not fit the criteria described in MRE 803(4) for the reason that neither Sharon Bloom nor Theresa Mackey were physicians. The prosecution responded that MRE 803(4) did not require such a narrow construction which limited the exception to physicians and cited in support of their argument the case of *In re Freiburger* 153 Mich App 251 (1986). *Frieburger,* supra, was the only

authority cited on this issue by either counsel and therefore this Court overruled defendant's objection and allowed both of the above-described witnesses to testify as to the statement made to them by Tina Ringe.

Contrary to the Prosecutor's assertion, this issue *was* in fact, addressed by the Supreme Court in the case of *People v. LaLone* 432 Mich 103 (1989). In *LaLone* the Court reversed the defendant's conviction because hearsay testimony as to the *nature of the offense and* the *identity of the perpetrator* was admitted through the testimony of the psychologist. The Court therein found that the nature of statements made by "patients" to psychologists did not bear sufficient reliability to warrant including them within the MRE 803(4) hearsay exception. The Court further found that said exception did not authorize the admission of the identity of the perpetrator through such a process. Because of the admission of these two types of testimony, LaLone's conviction was reversed.

The Supreme Court further ratified the *LaLone* court's prohibition of psychologist testimony as coming within the intended definition of MRE 803(4) in *People v. Beckley* 434 Mich 691 (199) p. 728, where the Court stated:

> "Thus, in *LaLone,* we ruled that statements made to a psychologist were less reliable than those made to a physician and were not within the specific language of the rule which allows evidence of information necessary for medical treatment or medical diagnosis."

The *Beckley* Court provided an accurate rationale as to why there liability of statements which are normally included within

hearsay exceptions is not present in the case of psychologists where at page 729 it further stated:

> "*Psychologist and psychiatrists are not, and do not claim to be, experts at discerning truth. Psychiatrists are trained to accept facts provided by their patients, not to act as judges of patients credibility.*" (Emphasis Added.)

In the present case these two witnesses, especially witness Mackey, testified extensively as to statements made to them by the victim regarding the details of the offense. The above-cited cases make it abundantly clear that the admission of such testimony was error which requires this Court to grant the defendant a new trial. This Court will now, at some length, detail the testimony of each of these witnesses which establishes why the argument, that such testimony is wrought with unreliability (and hence inadmissible) is so compelling.

1. The testimony of Sharon Bloom.

a) Ms. Bloom testified she works for an organization called LACASA, the Livingston Area Council Against Spouse Abuse. She testified that the purpose for this organization is to counsel and *help* women who *have been* battered in relationships both physical and emotional. (Trial p. 136). The partiality of someone in such a role is self-evident and her objectivity in this regard is, at best, suspect.

b) She worked also for an organization known as SARA which is an acronym for Sexual Assault Recovery *Assistance*. (Emphasis Added) (Trial p. 136).

c) She testified she was asked to take on the victim Tina Ringe as a sexual assault *client* in May of 1999.

d) It was clear from the trial testimony that at this point in time, when the victim was witness Bloom's "client", that the victim had already talked with the police about her allegations against the defendant. Therefore, there was motivation on behalf of the victim to conform her statements to Ms. Bloom to those statements previously made to the police, a major concern of the Supreme Court in *LaLone*, supra, and *Beckley*, supra.

e) She had experience with 45 to 50 clients. (Trial p. 140).

f) She took the victim's statement to facilitate with her healing process and that part of the therapy process is to be able to talk about "it". (Trial p. 151). One must contrast this with the purpose of a medical physician in taking a statement or history from a patient.

g) It was clear from Ms. Bloom's testimony that diagnosis had little to do with her eligitation of the details of the offense. She testified at trial at p. 156, "It wasn't my intention to render diagnosis".

h) Perhaps the best illustration of the difference between the necessity of a medical physician obtaining truthful and reliable statements from a patient and the necessity of Sharon Bloom or a person in her position of obtaining that quality of statement is the testimony of Sharon Bloom at p. 157 where she states "I wasn't there to determine anything. . . . She was *my* client. . . . I wasn't there to draw a conclusion about anything. . . .".

Appendix E

i) Ms. Bloom testified that she just *assumed* that what the victim identified as the cause of the victim's psychological problems was in fact the cause (Trial p. 158). Certainly a medical physician would not, under similar circumstances, assume that what was being told was true where there would be confirmatory tests or observations through x-ray, etc., that a physician could undertake to corroborate the statement of the patient. This distinction further underscores the contrast in reliability between statements made by patients to psychologists as compared to statements made by patients to physicians.

j) Ms. Bloom testified that she was not there to diagnose. (Trial p. 162).

k) Witness testified that her purpose in obtaining statements from the victim was to provide a safe place, to access feelings, to support her in regaining her self-esteem and not feel vulnerable. The witness testified that in order to accomplish this all that was necessary was that she *conclude* that a sexual assault *occurred* (As opposed to the need to obtain factual *detail*). (Trial p. 166).

l) The *LaLone* court makes an important point in distinguishing between the reliability of statements made to psychologists versus those made to physicians where it states on p. 110: "In addition, although there are psychological tests, fabrications of physical complaints which seem to be far easier to discover through empirical tests than are fabrications which might be heard by an examining psychologist." The testimony of Sharon Bloom in this regard was indeed very enlightening. This Court finds that her testimony makes it clear that not only did she not see the importance of determining whether what she was being told were fabrications but further she made no effort to

make such a determination. Ms. Bloom states on p. 180 of the trial transcript ". . . it's not part of the treatment to confront". She testified that she never saw a prior inconsistent statement of the victim which was given to an associate of hers, Joyce Ewing, prior to taking the history of the victim in this case. (Trial p. 182). She testified that "I determined that what she was telling me was the truth by what she said and how she said it". (Trial p. 183). She checked with no other source as to the truth of Ms. Ringe's statements and took no psychiatric history whatsoever. (Trial p. 184, 185). Ironically, the above testimony of Sharon Bloom indicates that she had no idea of whether or not the person that she was speaking to was psychotic or suffered from any other mental illness. This Court finds that such a determination or the lack of thereof further illustrates the lack of reliability of such statements, especially under these circumstances.

Although the *LaLone* court (p. 110) recognized that there are some objective psychological tests which could be performed to attempt to rule out fabrications of psychological patients, it is clear from the testimony of Sharon Bloom that no such psychological tests were conducted (Trial p. 185).

m) The trial transcript at p. 196 of Sharon Bloom's testimony reveals, perhaps in a nutshell, the glaring unreliability of such statements especially as taken in the context of this case and through this witness. Upon this Court's inquiry witness Bloom admitted that although she concluded that the victim's symptoms were caused by a "rape" the witness admits that she in fact never asked the victim about any other possible causes. Bloom added that she knows this incident caused the victim "injury" because she wouldn't be there for counseling unless she had been recently sexually assaulted.

Appendix E

Based on the above examples adduced at trial, this Court concludes that the only thing which can be concluded reliably about the statements of the victim to Sharon Bloom was that the victim was speaking to her in the English language. It was clear to this Court that the specifics of what was said to witness Bloom by the victim did not matter whatsoever; what mattered was the fact that the victim was *talking out* her *feelings*. It was the *feelings* of the victim that were important to this witness and not what had occurred to her which *caused* the feelings. Assuming arguendo that *Beckley* and *LaLone* had included statements made to psychologists as falling within the definition of the hearsay exception contained in MRE 803(4), this Court would be required to conclude that such statements, made in the context of this case, were so glaringly unreliable so as to cause the exception not to apply herein.

2. The Testimony of *Theresa Mackey.*

The width and breadth of the lack of reliability of the victim's statements to Sharon Bloom can only be exceeded by the illustrations which this Court will use in this regard when concerning the testimony of Theresa Mackey. The case of the *People v. Timothy Hensick* was the first criminal trial at which witness Mackey had testified.

a) It is clear from the testimony of witness Mackey that at the time the defendant began telling her of what had occurred at the time of the "assault" that she had already told her story to the police, to Jack Dunn, to Sharon Bloom, and to her own attorney. *The existence* of an individual's *motive to keep their statements consistent* (and therefore less reliable) is recognized by the *LaLone* court on p. 115.

b) Witness Mackey testified that she had no training as a psychologist and therefore would be unable and did not in fact administer any psychological tests in an effort to judge the reliability or veracity of the victim's statements.

c) That although the victim denied to witness Mackey that she had made a statement to a mental health nurse which was exculpatory to the defendant and which appeared to witness Mackey in her records, witness Mackey none-the-less relied on the statement to her of the victim's recollection of the "event" in making her treatment decisions. (See p. 5 of the trial transcript of August 27, 1991). The very existence of such contradictory statements made to treating professionals is an animal particularly unique to the realm of psychology and psychiatry and therefore illustrates to a great degree, the inherent unreliability of psychological or psychiatric histories for MRE 803(4) purposes.

Witness Mackey gives an illustration of the above observation at p. 26 of her trial testimony on August 27, 1991 where she states "There's a difference between a person's *perception* of what their own experience is and what they went through (reality). And that's what she presented to me". The underlying premise in the medical arena which is not present here is that in the medical arena the difference between perception and reality is usually insignificant. The inherent unreliable nature of such statements in the field of psychology cannot be illustrated any clearer.

d) Witness Mackey never asked the victim if there was any prior experience of sexual abuse before she made her diagnosis as to the effect of the sexual abuse in this case. This is despite the fact that there was ample evidence brought out at trial that the victim had suffered extensive physical and sexual abuse

throughout her entire life. (Trial transcript p. 38 of August 27, 1991).

e) Mackey testified that June 14, 1990, on her first meeting with the victim, that she gave the victim handouts of what rape victims would encounter with regard to symptoms.

f) Mackey stressed that her primary aim was dealing with the *symptoms* displayed by the victim and not the *causes* of those symptoms.

g) Most incredibly, this witness testified that Tina Ringe, the victim, brought her attorney with her for the interview on June 14, 1990 and that this attorney made statements to witness Mackey during this consultation and the victim merely acknowledged the accuracy of statements made by her attorney. This court cannot imagine a scenario which would give rise to a stronger argument that the statements made by a victim (or in this instance the victim's attorney) could be illustrated with greater force.

h) It is ironic to note that the means of reporting the psychological condition is by use of the very instrument being reported on, if the instrument being used is damaged or injured, how then can any report from the instrument itself be reliable? It seems apparent that the physical condition that the mind can *least* report on in a reliable fashion is itself, not only because it is a process of self-reporting but the condition of the mind is least subject to corroboration than any other condition of the human body.

This Court concludes that the admission by this Court of the above testimony of witness Theresa Mackey was an error that

resulted in a miscarriage of justice and requires that the defendant be granted a new trial.

C. The Timely Compliance With Orders of Discovery and Timely Disclosure of the Exculpatory Information.

The defense submitted at trial was twofold: 1) the acts complained of occurred as a result of consensual sex relations as opposed to sex relations obtained by the use of force and/or coercion; and 2) that if such acts were the product of force and/or coercion that the element of personal injury was not created by these acts but by acts which had occurred to the victim at a prior time in her life. Defendant's request for discovery of information began as early as the time of defendant's initial arraignment in Livingston County District Court. Upon this Court's involvement in this case it became readily apparent that the nature of the charge made the issue of the victim's credibility central to the success of the prosecution's case. It was also clear to this Court that the psychological history as revealed by any documentation or records was relevant not only to the credibility of the victim but also would have extreme relevance on the issues of what caused the personal injury claimed by the prosecution in this case which elevated the offense to Criminal Sexual Conduct in the First Degree as opposed to Criminal Sexual Conduct in the Third Degree. It was therefore obvious to all concerned that any evidence of inconsistent statements made by the victim or psychological records affecting the victim's state of mind were central to defendant's request for discovery. The existence of such information therefore would, in any general sense of the word, be considered exculpatory in nature.

The above discussion of the events which transpired either did or should have made it abundantly clear to the prosecution

that any such information available to them should have been made available to the defendant. As the trial in the cause unfolded it became clear to this Court that such exculpatory information did in fact exist, was known to the prosecution or within the reasonable reach of the prosecution, that the prosecution failed and/or refused to turn over such information, and that such failure or refusal resulted in the inability of the defendant to properly cross-examine the victim and other witnesses and also to adequately prepare the defense prior to the commencement of the trial.

The prosecution called as their first witness Ms. Tina Ringe, the victim in this case, on August 20, 1992. Her testimony continued into August 21, 1992 and was completed on that date. After Ms. Ringe had completed her testimony and had been excused as a witness, the prosecution notified the defense of the existence of a letter written by Ms. Ringe's sister, Ms. Tanya Wrinn to Trooper Mary Murphy of the Michigan State Police, the officer in charge of the investigation of this case. Wrinn's letter to Trooper Murphy described the events of the alleged offense as explained to Wrinn by the victim Tina Ringe. It is apparent from the letter that it could have been considered exculpatory in nature to the extent and it contained certain information that was inconsistent with the victim's testimony at trial. This letter was not made available to the defendant prior to either defendant's preparation for trial or cross-examination of Tina Ringe on August 21, 1992. For some reason, the Wrinn letter was left in the investigative file of Trooper Murphy and was not made available until after Ms. Ringe testified. Consequently, the defense requested and the Court required Ms. Ringe to return to the witness stand, which in fact occurred on August 23, 1992.

In conjunction with the testimony of prosecution witness

Appendix E

Theresa Mackey and after the victim had left the stand as a witness for the *second time*, defendant's counsel was notified of the existence of records from the University of Michigan regarding the counseling of the victim which defendant had not yet received. These records contained exculpatory information on the issues of the credibility of the victim as well as her psychological state and its effect on the cause for alleged personal injury. This occurred despite the fact that such records could be fairly viewed to have been included in defendant's request for such information on July 12, 1990 as well as the Court's discovery order of August 13, 1991.

The issue therefore now before this Court is whether the events as described above denied the defendant a fair trial to the extent that it resulted in a miscarriage of justice requiring the granting of his Motion for a New Trial.

In *People v. Walton* 71 Mich App 478 (1976) the Court at p. 484 set forth their basic tenet of criminal procedure which is now well accepted: "First, fairness to the defendant and an adequate opportunity to prepare a defense, including preparation for cross-examination of witnesses, requires that the defendant be given access to all relevant information." See also *People v. Dellabonda* 265 Mich 486 (1933); and *People v. Johnson*, 356 Mich 619 (1959). This rule is of particular significance in this case for the reason that the factual issues herein were very closely drawn. From the outset the outcome of the contested issues in this case were dependent upon whether the jury believed the testimony of the victim and whether such testimony proved guilt beyond a reasonable doubt or, on the other hand, whether they believed the testimony of the defendant that these sexual acts were consensual in nature. In this regard the Court notes that the proofs at trial establishing guilt were extremely weak, especially

when compared to the proofs adduced at trial on defendant's behalf which were extremely strong. The lopsided nature of the evidence in this case in conjunction with the present issue brings in to play an observation made by the *Walton* court also at p. 484: "This is particularly true, as in the case at bar, where the question of credibility may be pre-eminent. Any inconsistent or conflicting statements may have considerable impact on the determination of the credibility of the parties and witnesses and may therefore be determinative of the outcome of this prosecution."

The Court is cognizant of the fact that the defense would have had at least a third opportunity to have the victim retake the witness stand and once again be confronted with the inconsistent statements revealed piecemeal throughout the course of the trial. However, such a procedure ignores the reality of the effect that such conduct could have on the jury ie: that the defendant and/or his attorney are "browbeating" the witness. Such an argument does nothing to dispel the damage which has been done by defendant's inability to prepare for trial both for cross-examination of witnesses as well as the inability to discover defense witnesses on his own. This effect has been considered as prejudicial by the Court of Appeals in the case of *People v. Thornton* 80 Mich App 746 (1978). Defendant's point in this regard is further emphasized by his efforts both before and on the day of trial to gain a continuance for the purpose of both gathering further discovery materials for impeachment purposes as well as to obtain an expert on defendant's behalf to rebut the prosecution's expert testimony.

This Court finds that the Wrinn letter as well as the University of Michigan records cited above bore directly on the credibility of the victim in this case. The Court further finds that

the prosecution violated this Court's discovery order in failing to turn such information over well in advance of trial.

At p. 77 of the prosecutions final argument she (the prosecutor) points out (most unintentionally) the damage caused by her own failure to turn over all the records ordered to be discovered in this case when she comments:

> "Now, he first brings your attention to this University of Michigan note: She said nothing, didn't fight. The law doesn't require that she say anything. The law really doesn't require that she fight. And the other thing is this is some note which has been taken by *someone who was not brought in here.*" (Emphasis Added)

If the record in question had been turned over in a timely fashion the defendant would have had the opportunity to bring the witness to court. The prosecutor not only denied the defendant such an opportunity but then took unfair advantage of the error in final argument. Said information was clearly exculpatory in nature and therefore the prosecution had a duty to disclose this evidence well in advance of trial, *U.S. v. Agurs* 427 U.S. 97 (1976). Because this evidence concerned the credibility of the chief witness in this case the law considers it material evidence. *People v. Torrez* 90 Mich App 120 (1979). The prosecution's failure to turn over this information to the defense in a timely fashion is not excused by their good faith. *Brady v. Maryland* 373 U.S. 83 (1973).

The Michigan Supreme Court in 1959 stated a principle which still holds true today: "The legal concept of a criminal trial

has changed considerably in modern times. This seems less as an arena where two lawyer gladiators duel with the accused fate hanging on the outcome and more as an inquiry primarily directed toward the fair ascertainment of truth." *People v. Johnson* 356 Mich 619, 621 (1959). In putting this concept of law into action the Court adopted the following principle at p. 626: "We start with the premise that truth is best revealed by a decent opportunity to prepare in advance of trial. We've embraced that tenant with a respect to civil litigation and absent overriding considerations that should be as valid in criminal matters."

This court concludes that the defendant was neither given a decent opportunity to prepare for trial by virtue of being without the materials discussed above nor was the defendant given a decent opportunity to cross-examination the most crucial witness in this case in a timely fashion. The defendant's inability in this regard was brought on by the failure to make adequate disclosure on behalf of the prosecution. This Court finds that this conduct was error and that it prejudiced the defendant resulting in a miscarriage of justice. Therefore, on this ground alone, the defendant is granted a new trial.

D. Prosecution Comment on Defendant's Right to Remain Silent.

During her opening statement prosecution attorney made the following statement to the jury: "You will hear how Trooper Murphy then followed that up with another question asking if he had ever been over at her apartment, and how, at that point in time, Mr. Hensick asked Trooper Murphy 'Well, where are you going with that? What are you getting at?' *and then he decided he didn't want to talk with her anymore."* (See p. 45, August 20, 1991). Defendant characterizes the above statement by the

prosecutor as comment on the defendant's invocation of his right to remain silent. Defendant further asserts that this error is of such magnitude as requiring that defendant be granted a new trial.

Shortly after the above described comment by the prosecutor the defendant objected to the statement and requested a mistrial. The Court denied defendant's Motion for Mistrial at that time finding that the statement was fleeting in nature and that a cautionary instruction could remedy the alleged defect. This ruling was made at a time when, obviously, the Court had not yet heard the relative strengths of the prosecution and defense cases. The Court then directed the prosecution to refrain from, and instruct its witness Trooper Mary Murphy to refrain from, testimony which would indicate that the defendant revoked his right to remain silent as to any question.

The record reveals that both the prosecutor and Trooper Murphy complied with the court's directive in this regard. The bulk of defendant's argument on this issue is directed at predicating error on the testimony of Trooper Murphy alleging that Trooper Murphy somehow violated the Court's directive and placed before the jury, in the form of testimony, the defendant's invocation of his right to remain silent. This court has reviewed the record repeatedly and it is unable to locate any testimony from Trooper Murphy which even suggests that the defendant was invoking his right to remain silent. Trooper Murphy did testify as to the statements which were prefatory to the invocation, (ie: "Where are you going with this?"), but her testimony fell short of stating before the jury defendant's invocation of silence. This is the very reason why defendant's objection in this regard was overruled. Defendant's objection at trial as well as defendant's argument in connection with this motion simply fails to make it clear how Trooper Murphy and the prosecuting attorney elicited a refusal to answer questions on the part of the defendant from

Appendix E

Murphy's *testimony.*

The only question therefore which remains with regard to the issue of the defendant's invocation of silence is in connection with the prosecutor's opening statement. Citation of legal authority is totally unnecesssary to support the well established legal proposition that it is clearly improper and constitutes error for a prosecutor to place before the jury the fact that the defendant had exercised his right to remain silent. The determination which this Court must make in connection with defendant's Motion for New Trial is whether such error was prejudicial or simply harmless. *Chapman v. California*, 386 U.S. 18; 87 SC 824; 17 Ed 2d 705 (1967); *People v Robinson* 386 Michigan 551 (1972).

In *People v. Swan* 56 Mich App 22 (1974), the Court of Appeals made reference to and adopted the following standard:

> "Where it is claimed that error is harmless, two inquiries are pertinent. First, is the error so offensive to the maintenance of a sound judicial process that it never can be regarded as harmless? . . . Second, if not so basic, can we declare a belief that the error was harmless beyond a reasonable doubt?" (p. 31.)

The *Swan* court went on to state several circumstances which would exemplify what could constitute error that is "offensive to the maintenance of a sound judicial process". The first example listed by the *Swan* court is, "An error may be intolerably offensive if it is deliberately injected into the proceedings by the prosecutor. . .". This is exactly what occurred in this case. The prosecutor's comment during her opening statement as to the defendant's invocation of silence is considered by this Court to be

particularly intolerably offensive under the circumstances of this case. The primary tactic of persuasion used by the prosecution was the defendant's status as an attorney. The alleged trust in the defendant by the victim because of this status, the intelligence and resultant ability to deceive and/or mislead, and the forceful innuendo that members of this profession are particularly loathsome individuals were all tactics which were not lost on this court as to their ability to strongly plan on the anti-lawyer sentiment of the jury which is commonly acknowledged within society itself. When this court contrasts defendant's depiction by the prosecution as being "who he is" her comment on his invocation of his constitutional right to remain silent before the jury in opening statement becomes clearly offensive to the maintenance of a sound judicial process.

Assuming arguendo that the prosecutor's statement was not of such an offensive nature this court will analyze whether this error can be considered, under the circumstances of this case, harmless beyond a reasonable doubt. In applying this standard the Swan court stated at p. 33: "If it is reasonably possible that, in a trial free of the error complained of, even one such jury member might have voted to acquit the defendant, then the error was not harmless, and the defendant must be retried. If, on the other hand, 'the proof is so overwhelming, aside from the taint of the error, that all reasonable jurors would find guilt beyond a reasonable doubt', then the conviction must stand".

This case was a credibility contest between the victim and the defendant and this Court's analysis as to the alleged harmlessness of this error cannot therefore ignore the weight and quality of the proofs submitted at trial. In *People v Finley* 177 Mich App 215 (1989) the Court stated at p. 219:

Appendix E

> "Because the credibility of the various witnesses may very well have been the deciding factor in this case, the prosecution's use of defendant's silence when arrested for the instant crime cannot be found to be harmless error. Had this evidence not been presented to the jury, there is a reasonable doubt that at least one juror would have voted to acquit. The right to remain silent at the time of arrest and thereafter is a constitutional right and should not be used against the defendant. *This is especially true where the other evidence against defendant is not overwhelming.*"

It would be an extreme understatement for this Court to conclude that the "evidence against the defendant is not overwhelming". The weakness of the prosecution's case in conjunction with the strength of the defense case causes this Court to conclude very clearly that this error not harmless and was in fact prejudicial in nature.

This error by itself, or in conjunction with the errors discussed above were prejudicial to the rights of the defendant, resulted in a miscarriage of justice, and require that the defendant be granted a new trial.

Appendix E

Conclusion

That on the basis of the above discussion and the Court's conclusion regarding those matters it is ORDERED that the defendant's Motion for New Trial be, and hereby is, GRANTED.

Dated: March 13, 1992

s/ G. Michael Hocking
G. MICHAEL HOCKING
CIRCUIT JUDGE

APPENDIX F — ORDER GRANTING DEFENDANT'S MOTION FOR NEW TRIAL FILED NOVEMBER 25, 1992

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF LIVINGSTON

File No. 91-6537-FC

Honorable G. Michael Hocking

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v.

TIMOTHY L. HENSICK,

Defendant.

Richard Thompson (P21410)
Oakland County Prosecutor
By Special Appointment
By: Pamela J. Maas (P40452)
Richard H. Browne (P27825)
Attorneys for Plaintiff

Kenneth G. McIntyre (P17449)
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Appendix F

ORDER GRANTING DEFENDANT'S MOTION FOR NEW TRIAL

At a session of said Court held on the 24 day of November, 1992.

Present: Honorable G. Michael Hocking
Eaton County Circuit Court
Sitting by Special Assignment in
Livingston County by Order of the
State Court Administrator's Office

The Defendant having, on February 12, 1992, filed a Motion for a New Trial, that motion having been briefed and argued, and this Court having, on November 13, 1992, issued an OPINION REGARDING DEFENDANT'S MOTION FOR NEW TRIAL in which it granted said request, and the Court being otherwise fully advised in the premises;

IT IS HEREBY ORDERED that for the reasons stated in this Court's November 13, 1992 Opinion, Defendant's Motion for a New Trial be, and hereby is, GRANTED.

s/ G. Michael Hocking
G. Michael Hocking, Judge
Eaton County Circuit Court
Sitting By Special Assignment
in Livingston County

Countersigned:

_____

Deputy Clerk

Appendix F

APPROVED AS TO FORM FOR ENTRY:

RICHARD THOMPSON
Oakland County Prosecutor

Attorney for Plaintiff

s/ Richard H. Browne
By: Richard H. Browne (P27825)
Assistant Prosecutor
1200 North Telegraph Road
Pontiac, MI 48341
(313) 858-0705

Dated: November 23, 1992

SINAS, DRAMIS, BRAKE, BOUGHTON,
McINTYRE & REISIG, P.C.

Attorneys for Defendant

s/ Kenneth G. McIntyre
By: Kenneth G. McIntyre (P17449)
520 Seymour Avenue
Lansing, MI 48933-1192
(517) 372-7780

Dated: November 19, 1992

APPENDIX G —ORAL ARGUMENT AND STATEMENT OF ISSUE PRESENTED

STATE OF MICHIGAN

IN THE COURT OF APPEALS

Court of Appeals
No. 159459

Circuit Court
No. 91-6537 FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

-vs-

TIMOTHY L. HENSICK,

Defendant-Appellee.

APPELLANT'S BRIEF

ORAL ARGUMENT REQUESTED

PROOF OF SERVICE

RICHARD THOMPSON
PROSECUTING ATTORNEY
OAKLAND COUNTY

MICHAEL J. MODELSKI
CHIEF, APPELLATE DIVISION

Appendix G

BY: RICHARD H. BROWNE (P27825)
Assistant Prosecuting Attorney
1200 North Telegraph Road
Pontiac, Mich. 48341
(313) 858-0705

* * *

STATEMENT OF ISSUE PRESENTED

I. WHETHER JUDGE HOCKING ABUSED HIS DISCRETION BY GRANTING A NEW TRIAL WHERE THE GROUNDS CITED FOR THIS EXTREME FORM OF RELIEF CLEARLY DO NOT SUPPORT THIS REMEDY?

The trial court answered this question, "No."

Appellant contends the answer is, "Yes."

APPENDIX H — EXCERPTS OF PLAINTIFF'S BRIEF

* * *

D. THE PROSECUTOR PROPERLY INFORMED THE JURY IN HER OPENING STATEMENT THAT THE EVIDENCE WOULD SHOW THAT DEFENDANT HAD DECIDED NOT TO ANSWER ONE QUESTION POSED BY THE INVESTIGATING OFFICER UNTIL THE OFFICER TOLD THE DEFENDANT WHAT STATEMENTS THE VICTIM HAD MADE.

The trial court has also held that a new trial is required because of the prosecutor's reference to Defendant's decision to invoke his right to remain silent during questioning. In his motion for new trial, Defendant contended that the prosecutor committed error requiring reversal by eliciting testimony at trial from Trooper Mary Murphy regarding a pre-arrest statement Defendant made during the investigation of the victim's allegations and then by arguing in closing argument that the jury could infer from Defendant's statements that he was trying to conform his admissions to what the police already knew. [Footnotes Omitted.] Although the bulk of Defendant's argument was directed at the trial testimony itself, Defendant also briefly mentioned the reference to this testimony which the prosecutor made in her opening statement. Judge Hocking rejected Defendant's argument regarding the trial testimony and the closing argument; however, he revisited the prosecutor's remark in opening statement and decided, in retrospect, that this remark was so improper that it justified the granting of a new trial and that it could not be considered harmless. This determination is clearly wrong. It does not accurately assess the significance of the remark itself and it not only ignores the law concerning a prosecutor's remarks in opening statement but also misconstrues the law regarding harmless errors.

Appendix H

During her opening statement, the prosecutor outlined various statements Defendant had made to the police during the investigation of Tina Ringe's complaint. She also stated that at one point that Defendant "decided he didn't want to talk with her anymore."

Defense counsel objected to the prosecutor's remark outside the presence of the jury. (T, 8-20-91, 48-52) The trial court ruled it was a "fleeting reference in opening statement" that had not triggered the idea of a "*Bobo*" violation in his mind. He further indicated he would want to review the witness's proposed testimony prior to the time she testified. (T, 8-20-91, 52) He denied the motion for mistrial.

Regarding comments by a prosecutor during opening statements, the Court of Appeals has stated that, "Opening argument is the appropriate time to state the facts to be proven at trial." *People v. Robbins*, 132 Mich App 616, 620 (1984). The Court in *Robbins* further stated at p 620:

> * * * Whether the allowance by a trial court of a prosecutor's comments during opening argument amounts to error necessitating a mistrial is a matter of discretion for the trial judge and will not be reversed absent a clear abuse of discretion. *People v Jansson*, 116 Mich App 674, 690; 323 NW2d 508 (1982). * * *.

The Court of Appeals has held the standard to be used in evaluating a prosecutor's comments in opening statement is whether a defendant has been "*denied a fair trial by comments made by the prosecutor*". *People v. Coddington*, 188 Mich App

584, 602-603 (1991), lv den 439 Mich 963 (1992)(emphasis supplied). In *People v. Johnson*, 187 Mich App 621, 625-626 (1991), the defendant argued that the prosecutor had caused reversible error in his opening statement by stating "that defendant was a drug dealer and that defendant's motive for the shooting was to eliminate the competition were not supported by the evidence." The Court of Appeals held that although no direct evidence was ever produced to substantiate these statements, there was no showing of bad faith on the part of the prosecutor and therefore the defendant was not denied a fair trial. Clearly if the remarks in *Johnson* didn't deny the defendant a fair trial, the "fleeting reference" to Defendant Hensick deciding not to answer further questions could not have I denied him a fair trial in this case. A review of the trial record supports this conclusion.

During the brief hearing that was conducted at trial, Trooper Murphy testified that she gave Defendant the *Miranda* warnings and he waived his rights and agreed to answer questions without an attorney. (T, 8-27-91, 151) Defendant did not challenge this fact. Trooper Murphy testified that she told Defendant the victim had made a CSC complaint against him. (T, 8-2791, 153) She asked him if he'd ever met with her socially outside the office, but she did not specifically ask if he'd met her socially at her apartment. (T, 8-27-91, 151; 155-156) She then asked him if he'd ever been to her apartment. At that point he paused and said he "wanted to know where she was going with this" and then he said he "wanted to know what Tina Ringe's story was" *before he would answer that question.* (T, 8-27-91, 151-152) She testified that Defendant was very adamant about wanting to know what the victim had told her; he asked about this throughout the interview. (T, 8-27-91, 156; 158) Defense counsel's cross-examination suggested numerous forms Defendant's "refusal to answer" might have taken and sought to get Trooper Murphy to adopt his

phraseology. However, when he questioned her directly from her notes, defense counsel stated:

> "* * * Well, your write-up says, 'Hensick was then asked if he'd been to the Quail Creek Apartments, in the last four to five weeks, for any reason.' It goes on to say, without any explanation, that he'd asked what her side of the story was, and he told you that he wasn't going to answer that question until you told him. It then goes on to say, "Hensick stated that he had not." * * *.
>
> (T, 8-27-91, 158-159)

After advising Defendant she would not tell him what the victim had said (which she told him repeatedly), Trooper Murphy then asked Defendant if he'd been to the Quail Creek Apartments in the last four to five weeks and he responded, "No" without again protesting that he wouldn't answer without knowing what the victim's "side of the story was." (T, 8-27-91, 159-160)

The trial court ruled that the Defendant's *refusal to answer* a question could not be elicited by the prosecutor. (T, 828-91, 22-23) This ruling was based on the trial court's determination that this was an invocation of his right to remain silent and thus could not be presented to the jury under *People v. Bobo*, 390 Mich 355 (1973). The trial court instructed the prosecutor to "direct the other officer to refrain from testifying that he chose not to answer a certain question until he found out what the alleged victim had to say". (T, 8-27-91, 23)

In front of the jury, Trooper Murphy testified that Defendant was not in custody when she interviewed him. She nevertheless

gave him the *Miranda* warnings. He waived his rights and agreed to answer questions. (T, 8-28-91, 59) During the course of her testimony concerning the interview, Defendant objected but was overruled by Judge Hocking.

The prosecutor assiduously followed the trial court's ruling — a fact recognized by the trial court since it *overruled* Defendant's objection to Trooper Murphy's answer and since it declined to find error on this point in response to the motion for new trial. Trooper Murphy did not inform the jury that Defendant had refused to answer a question until he found out what the victim had told her. She testified only to the question Defendant asked *before* he stated he wouldn't answer the question concerning whether he'd been to the victim's apartment. This question was not an invocation of his right to remain silent and thus there should be no argument that it was not properly admissible.

However, the People assert that even Defendant's statement to the effect that he wanted to know what Tina Ringe had told Trooper Murphy before he'd answer her question is not an invocation of the right to silence. Instead it is a negotiation that clearly implies the subject will answer more questions provided he gets certain information in return. Defendant showed he didn't wish to remain silent as to all questions by answering a further inquiry by Trooper Murphy. Thus Defendant's "equivocal" statement should also have been admitted. Since that is the statement that the prosecutor referred to in her opening statement, it could hardly have been a deprivation of Defendant's right to a fair trial for the prosecutor to make a "fleeting reference" to that statement.

The lower court correctly held that references to Defendant's

statements in the prosecutor's closing argument did not constitute reversible error. Since this did not form part of the court's reasoning for granting a new trial, the People will not set forth their argument on this point. Suffice it to say that it is incongruous to find that no error occurred during the questioning at trial or in the closing argument, but that, in retrospect, a fleeting reference in opening statement caused such momentous error that the conviction must be set aside and the entire case retried. It is significant, however, that during *defense counsel's* questioning of Det. Conlin, the following question an answer occurred:

> Q [By defense counsel] You didn't feel it necessary to tell him where the Ringe complaint stood when he asked where you were going, *and he didn't feel it necessary to continue to answer your questions when you wouldn't tell him that; isn't that a fact*?
>
> A [By Det. Conlin] I didn't feel it was my place to tell him where the other investigation by another agency stood, no.
>
> (T, 8-28-91, 44; emphasis supplied)

Thus it can be seen that defense counsel elicited for the jury the fact that Defendant had refused to answer police questions unless they agreed to tell him what they knew. In light of this fact, it is somewhat disingenuous for Judge Hocking to find reversible error in the prosecutor's opening statement.

The above discussion also demonstrates that the lower court incorrectly evaluated the harmless error test. Although Judge Hocking cited *People v. Swan*, 56 Mich App 22, 31 (1974), lv den 395 Mich 810 (1975), his discussion suggests that he was

engaged in a hunt for error rather than a realistic evaluation of the alleged error in this case. The *Swan* case required that two inquiries be undertaken:

> * * * First, is the error so offensive to the maintenance of a sound judicial process that it never can be regarded as harmless? * * * Second, if not so basic, can we declare a belief that the error was harmless beyond a reasonable doubt?

The lower court felt that *Swan* directed that where an error was *deliberately interjected* into the trial by the prosecutor, it couldn't be considered harmless. Judge Hocking then stated that it believed this "error" had been deliberate because the prosecutor used it as part of a strategy to appeal to the supposed "anti-lawyer" bias of the jury. (Opinion, p 27) This twisted logic demonstrates the lengths to which the lower court will apparently go to reach its predetermined result.

In *Swan*, the error was *the elicitation of testimony* by the prosecutor from a police witness that the defendant had exercised his right to silence. The *Swan* Court held this error "did not constitute such an affront to the integrity of the trial process that reversal is required on these grounds." 56 Mich App at 32.

In the instant case, the "error" was a "fleeting reference" in the opening statement. The prosecutor made this reference because she honestly believed this evidence was admissible. As argued by the People above, this evidence *was* admissible. The trial judge did not feel that this reference necessarily raised a "*Bobo*" issue even in his own mind. The jury was instructed that the arguments of counsel were not evidence — only the testimony

of the witnesses was evidence. (T, 8-30-91, 90-91) The prosecutor's "fleeting reference" was clearly not the type of deliberate injection of error that *Swan* suggested could be intolerably offensive to the maintenance of a sound judicial system.

Next, the trial judge stated that even if the prosecutor's statement wasn't offensive, it could not be considered harmless beyond a reasonable doubt in the context of this case. Judge Hocking arrived at this conclusion because the case was a credibility contest between the victim and the Defendant and, in his judgment, the prosecutor's case was "weak" compared with the "strength" of the Defendant's case. Judge Hocking failed to even attempt to explain how the prosecutor's case was "weak" and the Defendant's case was "strong". However, comments Judge Hocking had made during trial and at sentencing suggest from whence his assessment had arisen.

During trial, in an apparent fit of pique at what he considered the deliberate obtuseness of Dr. Mackey, Judge Hocking declared:

> "* * * I don't know what she's shed light on, but I'll tell you this, if all you have to show extreme mental anguish was this witness — first, it would get directed out. You've got enough, but it didn't come from her, because I don't know that a rational trier of fact can make heads or tails of her testimony at this juncture. I certainly could not.
>
> And I also want the record to reflect that I do judge credibility of witnesses. And if this

> were a nonjury trial — and I'm sure that some people in this room are very glad this is a jury trial. If this was a nonjury trial, I'd have to make that determination. * * *.
>
> (T, 8-27-92, 101-102)

At the sentencing, Judge Hocking twice stated unequivocally that if he'd tried the case he would have acquitted the Defendant. (T, 11-25-91, 20; 56) Judge Hocking then made it abundantly clear that his belief in Defendant's innocence was going to control how he scored the sentencing guidelines and what sentence he would impose. He went out of his way to tell the Defendant what issues he believed should be raised in a motion for new trial or on appeal. (T, 11-25-92, 55-57) But the most telling indications of where Judge Hocking's thinking was coming from were offered by the judge when he listed his reasons for departing below the sentencing guidelines.

It is absolutely clear that Judge Hocking did not accept the verdict of the jury. In fact, it is not overstating things to say that the clear impression left from Judge Hocking's comments during trial and at the sentencing is that he was *angry* that Defendant had been convicted. However, even beyond this it is apparent that Judge Hocking's own belief in Defendant's innocence was based upon his chauvinistic view of male-female sexual relations. It may well show only this writer's naivete, but it is incomprehensible that in this day and age a mature, intelligent elected official could publicly state that "common sense tells me that when a man calls a woman at 2:00 a.m. and says that he wants to come over and talk and he's — that's accepted, a reasonable person . . . understands that that means certain things." Clearly this was not an off-hand remark, because then Judge Hocking proceeded to find it mitigating that Defendant helped the victim

off the floor *after he'd raped her* — suggesting that Defendant wasn't a bad guy because he was so polite to the victim of his forcible sexual assault. The remarks quoted above make it clear that Judge Hocking's conclusion that the instant case was "the weakest criminal case that resulted in a conviction that I've ever seen" stemmed from his archaic view of women and their sexual relationships with men, to-wit: if the victim didn't want sex with Defendant she shouldn't have allowed him to come over at 2:00 in the morning (therefore since she did allow him to come over, she was at least giving the appearance of consenting to have sex), and if she didn't want to have sex, she should have struggled or screamed. The criminal sexual conduct statute was enacted precisely to lay to rest those out-dated views of what constituted rape and consent.

Returning to the assessment of the possible effect of this alleged error on the outcome of the trial, the People submit that the nature of the error must be considered. Judge Hocking did not do this. By his own description, this comment was a "fleeting reference". It occurred during the prosecutor's opening statement. The prosecutor assiduously avoided bringing out any testimony on this particular point at trial. In fact, as noted above, the Defendant's own counsel brought out the fact that Defendant had refused to answer certain police inquiries. Given the judge's admonition to the jury that the statements and arguments of counsel were not evidence, along with the brevity of the challenged remark, it is *inconceivable* that the prosecutor's brief remark had *any* effect on the jury's decision. The fact that this was a credibility contest does not automatically mean that *any* error, no matter how inconsequential, cannot be harmless. And as the People have established above, it cannot even be said the prosecutor's brief remark *was* an error.

Furthermore, the Defendant admitted that the charged sexual conduct took place (with the exception that he admitted only one act of oral sex and claimed he hadn't exposed his penis). The dispute was over whether the acts were consensual or nonconsensual. Defendant claimed that he called the complainant at 2:00 a.m. to ask her out, but that he instead asked if he could come over to talk to her. Defendant also claimed that the complainant not only did not resist his sexual advances, but that she enthusiastically joined in them. They parted amicably with the agreement that he'd contact her soon. Yet, despite this idyllic picture, the complainant called a rape crisis hotline within an hour of Defendant's departure. Although Defendant was able to bring out some apparent inconsistencies in how the complainant described the incident, Defendant himself made statements to the police (as related above) that suggested he was lying about the incident (or at least attempting to tailor his description to the information the police already had from the complainant). The testimony presented at the trial convincingly demonstrated that the complainant had suffered severe and continuing trauma as a result of *this incident.* In light of the trial testimony, it cannot be said that the prosecution's evidence was "weak" and the Defendant's was "strong". In fact, as indicated above, Judge Hocking's assessment of the relative strength of the prosecution's case appears to be directly related to his gender-biased view of the victim's testimony.

A rational view of the nature of the alleged error, its relative insignificance in the context of the evidence subsequently introduced at trial concerning the Defendant's statements, the trial court's instructions, and the case law such as *Johnson* and *Robbins* makes it clear that the prosecutor's brief comment in her opening statement could not have deprived Defendant of a fair trial and, even if erroneous, amounted at most to harmless error

under the applicable test. Judge Hocking clearly abused his discretion in ruling that this error — either alone or in conjunction with the other alleged errors — constituted sufficient grounds to justify the granting of Defendant's motion for new trial. That determination must be overturned and Defendant's conviction reinstated.

* * *

APPENDIX I — APPELLANT'S APPLICATION FOR LEAVE TO APPEAL DATED JUNE 30, 1994

STATE OF MICHIGAN

IN THE SUPREME COURT

Supreme Court No.

Court of Appeals No. 159459

Circuit Court No. 91-6537 FC

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

-vs-

TIMOTHY L. HENSICK,
Defendant-Appellee.

APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

RICHARD THOMPSON
PROSECUTING ATTORNEY
OAKLAND COUNTY

JOYCE F. TODD
CHIEF, APPELLATE DIVISION

BY: RICHARD H. BROWNE (P27825)
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Appendix I

STATEMENT OF ORDER APPEALED FROM AND RELIEF SOUGHT

This application for leave to appeal is being filed from a 2-1 per curiam opinion of the Court of Appeals released June 9, 1994. The Court of Appeals affirmed a decision by Judge G. Michael Hocking (sitting by special assignment in the Livingston County Circuit Court) which had granted a new trial in this case. (See attached copy of Court of Appeals opinion; Appendix A) This application is filed pursuant to MCR 7.301(A)(2) and MCR 7.302(B) (3) & (5).

The People seek an order granting leave to appeal, or, in lieu thereof, a order summarily reversing the decision of the Court of Appeals and remanding this case to that Court for disposition of the People's appeal from the sentence imposed upon the Defendant.

STATEMENT OF ISSUE PRESENTED

I. WHETHER JUDGE HOCKING ABUSED HIS DISCRETION BY GRANTING A NEW TRIAL WHERE THE GROUNDS CITED FOR THIS EXTREME FORM OF RELIEF CLEARLY DO NOT SUPPORT THIS REMEDY?

The trial court answered this question, "No."

The Court of Appeals answered this question, "No."

Appellant contends the answer is, "Yes."

Appellee will contend the answer should be, "No."

Appendix I

RELIEF

WHEREFORE, Richard Thompson, Prosecuting Attorney in and for the County of Oakland, by Richard H. Browne, Assistant Prosecuting Attorney, respectfully requests this Honorable Court to grant this application for leave to appeal to review the important issues concerning the admission of evidence and the circumstances under which a new trial can properly be granted which have been presented. Alternatively, the People would request this Court to summarily reverse the decision of the Court of Appeals which has affirmed Judge Hocking's grant of Defendant's Motion For New Trial, and re-instate Defendant's conviction and remand this case to the Court of Appeals for disposition of the issues raised in the prosecution's appeal from the sentence.

Respectfully submitted,

RICHARD THOMPSON
PROSECUTING ATTORNEY
OAKLAND COUNTY

JOYCE F. TODD
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Date : June 30, 1994

APPENDIX J — DELAYED MOTION FOR RECONSIDERATION OF THE SUPREME COURT OF THE STATE OF MICHIGAN DATED FEBRUARY 24, 1995

STATE OF MICHIGAN

IN THE SUPREME COURT

Supreme Court
No. 100068

Court of Appeals
No. 159459

Circuit Court
No. 91-6537 FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

-vs-

TIMOTHY LEE HENSICK,

Defendant-Appellee.

DELAYED MOTION FOR RECONSIDERATION

Now comes Richard Thompson, Prosecuting Attorney in and for the County of Oakland, by Richard H. Browne, Assistant Prosecuting Attorney, bringing Appellant's Delayed Motion For Reconsideration, and states as follows:

Appendix J

1. On January 25, 1995, this Court issued an order denying Plaintiff-Appellant's application for leave to appeal. Justices Boyle, Weaver, and Mallett would have granted leave to appeal. (See attached copy of order) A refusal to grant relief will force the victim to re-live this ordeal. This victim became suicidal and had to be admitted to the Psychiatric Emergency Room at University of Michigan Hospital after she testified in open court about this rape. (See attached Affidavit of Pamela Maas, the Assistant Prosecutor who tried this case) This Office firmly believes that a grant of a new trial under these circumstances will constitute a grave miscarriage of justice.

2. The Judicial Tenure Commission has determined that the trial judge who ordered the new trial in this case was biased against the female victim and against the female prosecutor who tried this case. This bias inevitably colored the trial judge's decision to grant a new trial in this case to the detriment of the victim and the prosecution.

3. In arriving at its decision in this case, the Court of Appeals did not consider the trial judge's improper bias or the victim's and the prosecution's right to a decision on the motion for new trial rendered by an unbiased judge. There can be no dispute that if a trial judge was shown to be biased against a defendant, any appellate court would immediately reverse an outcome-determinative ruling by that judge against the defendant.

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